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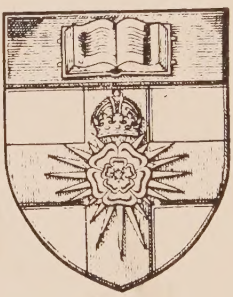

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IN IRELAND,

AND

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The Right Hon. Gerald FitzGibbon.
The Right Hon. Samuel Walker.
The Right Hon. Hugh Holmes.

King's Bench Division.

The Right Hon. Lord O'Brien, L.C.J.
The Right Hon. Christopher Palles, C. B.
The Right Hon. William Drennan Andrews.
The Right Hon. William Moore Johnson.
The Right Hon. John George Gibson.
The Right Hon. D. H. Madden.
The Hon. Walter Boyd.
The Right Hon. William Kenny.
The Hon. Dunbar Plunket Barton.
The Hon. George Wright.

Attorney-General.

The Right Hon. John Atkinson.

Solicitor-General.

James H. Campbell, K.C.

[These Reports will be cited as follows :—[1904] 2 I. R.]

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King's Bench Division, and Court for Crown Cases Reserved,	JOHN LINEHAN, JOHN G. THOMPSON, R. ST. J. CHADWICK,	Barristers-at-law.
King's Bench Division (Probate),	WILLIAM LAWSON, R. W. LUCAS,	Barristers-at-law.
King's Bench Division (Bankruptcy),	D. M'C. MAHONY, JOHN MACMAHON,	Barristers-at-law.

In the Christmas Vacation, 1903–4, the Right Hon. the Vice-Chancellor resigned. On the 13th January, 1904, the following Resolution was passed by the Bar:—

> "That the Bar of Ireland, assembled in General Meeting, desire, on the occasion of the retirement of the Right Hon. Hedges Eyre Chatterton from the position of Vice-Chancellor of Ireland, to express our appreciation of the high qualities displayed by him during his long judicial career, and to tender our good wishes on his retirement."

In Hilary Sittings, 1904, the Hon. Dunbar Plunket Barton, one of the Judges of the King's Bench Division, was transferred to the Chancery Division in place of the Right Hon. the Vice-Chancellor.

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CORRIGENDA.

Page 68, line 8 of judgment of Lord O'Brien, L.C.J., *for* "definitely," *read* "definitively."

Page 515, line 3 from foot, *for* "assignee" *read* "assignor."

NOTE.

The Court of Appeal have affirmed the decision of the King's Bench Division in HAMILTON *v.* LONG, [1903] 2 I. R. 407; and have varied the decision of the King's Bench Division in THE ATTORNEY-GENERAL *v.* JAMESON, [1904] 2 I. R. 644.

CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1904.

THE KING (VINT) *v.* JUSTICES OF DONEGAL (1).

K. B. Div. 1903. April 22, 27.

Vaccination—Neglecting to comply with the Act—Second prosecution—Magistrate—Jurisdiction—26 & 27 *Vict. c.* 52—42 *&* 43 *Vict. c.* 70.

Where a person has been convicted, under sect. 8 of the Vaccination Act, 1863 (26 & 27 Vict. c. 52), for refusing and neglecting to have his child vaccinated, and after conviction still refuses and neglects to have the child vaccinated, he cannot, in respect of such continued refusal and neglect, be prosecuted again under sect. 7 of the Vaccination Act, 1879 (42 & 43 Vict. c. 70).

The Vaccination Act, 1879, was merely an amending Act, and did not create a new substantive offence, independent and distinct from that created by sect. 8 of the Vaccination Act, 1863. Sect. 9 of the Vaccination Act, 1879, did not abolish the registrar's notice provided by sect. 8 of the Vaccination Act, 1863, but merely rendered it unnecessary, in a prosecution for neglect, to prove that the defendant received the notice.

Repeated prosecutions for continued neglect can be brought by the sanitary authority, under the Public Health (Ir.) Act, 1878 (41 & 42 Vict. c. 52, s. 147).

(1) Before Lord O'Brien, L.C.J., and Andrews and Kenny, JJ.

K. B. Div. 1903.

THE KING (VINT) *v.* JUSTICES OF DONEGAL.

MOTION to make absolute a conditional order of *certiorari*. The prosecutor, Andrew Vint, of St. Johnston, in the Co. Donegal, was, on the 27th April, 1901, summoned before the magistrates at Raphoe for having refused or neglected to have his child, Maggie Vint, vaccinated, and was convicted and fined 1*s.* and 2*s.* costs. Again on the 27th September, 1902, he was summoned before the magistrates at the same Petty Sessions for having neglected to have the same child vaccinated, and was again convicted and fined in the sum of 5*s.* and 7*s.* 6*d.* costs. At the hearing of the second summons he protested against being summoned a second time for the same offence, and he contended that he could not be again convicted under the same Act for such offence. Upon these facts a conditional order for *certiorari* to quash the second conviction was granted.

The Guardians of the Poor of the Strabane Union showed cause against making absolute the conditional order, viz.: that the summons being brought under section 7 of the Vaccination Amendment (Ireland) Act, 1879 (42 & 43 Vict. c. 70), the offence was a continuing offence, and the previous conviction was no bar to the exercise by the Justices of their jurisdiction, and under the Vaccination Acts it was compulsory on the defendant to have his child in fact vaccinated.

R. E. Osborne, for the prosecutor, in support of the motion to to make absolute the conditional order, notwithstanding cause shown:—

The 26 & 27 Vict. c. 52, and the 42 & 43 Vict. c. 70, deal with the same offence, and are to be read together. The latter is merely an Amending Act; 42 & 43 Vict. c. 70, does not create any new offence. This statute merely amends the law, by reducing the period within which a child is to be vaccinated from six months to three months, and by increasing the penalty to twenty shillings, and by making it unnecessary in a prosecution to prove that notice to have the child vaccinated was given. The second conviction was therefore for an offence in respect of which the prosecutor had already been convicted and fined. [He referred to *Pilcher* v. *Stafford* (1).]

(1) 4 B. & S. 775.

Patchell, for the Guardians :—

The fourth paragraph of sect. 7 of 42 & 43 Vict. c. 70, creates a new offence. Treating the second conviction as having been based on that section, it is a good conviction in respect of an independent and substantive offence. Portion of the 26 & 27 Vict. c. 52, was left unrepealed, and the first prosecution and conviction were founded on section 8 of that statute, which still remains in force. Section 7 of the later Act is in substitution for section 1 (repealed) of the earlier statute, with a penalty added. [He referred to *Reg.* v. *Justices of Portsmouth* (1); *Pilcher* v. *Stafford* (2); *Allen* v. *Worthy* (3); *Knight* v. *Halliwell* (4).]

April 27.

LORD O'BRIEN, L.C.J. :—

This case involves a rather important point under the Vaccination Acts. It appears that Mr. Vint was summoned on April 27th, 1901, for neglecting to get his daughter vaccinated, and he was fined ; and he was summoned again on the 27th September, 1902, and he was again fined. He contended before the magistrates that the second prosecution did not lie, that it was a prosecution for the same offence as the first prosecution, and if he was right in that, and if it was the same offence, the prosecution did not lie.

Mr. Patchell, in his clear argument, contended that the offence referred to in the second Act of Parliament mentioned, viz. 42 & 43 Vict. c. 70, was a distinct, substantive, and independent offence from that mentioned in the 26 & 27 Vict. c. 52, the antecedent Act. That was ingeniously argued by Mr. Patchell, but upon consideration we do not think it well founded. We think that the latter Act, the 42 & 43 Vict. c. 70, is a mere amending Act, and that it does not create an independent and substantive offence. The first Act of Parliament, the 26 & 27 Vict. c. 52, made it compulsory upon parents to bring their children to be vaccinated within six months, and provided that if, after notice from the registrar of births, deaths and marriages, the child was not vaccinated, then that a prosecution lay. But it was an essential condition of the Act of Parliament that notice calling

(1) [1892] 1 Q. B. 491.
(2) 4 B. & S. 775.
(3) L. R. 5 Q. B. 163.
(4) L. R. 9 Q. B. 412.

K. B. Div. 1903.

THE KING (VINT) v. JUSTICES OF DONEGAL.

Lord O'Brien, L.C.J.

upon the parent to have the child vaccinated should be served. It was the essence of the prosecution under the first Act that notice should be served.

Now it is said that the second Act, in the section that I am going to refer to, creates a distinct and substantive offence. Here is the section: "Every parent or person having the custody of a child, who neglects to take such child or to cause it to be taken to be vaccinated, or after vaccination to be inspected, according to the provisions of the Vaccination (Ireland) Acts, and does not render a reasonable excuse for his neglect, shall be guilty of an offence and be liable to be proceeded against in a summary manner, and upon conviction shall be liable to a penalty not exceeding 20*s*." What influences me in the determination that I have come to is, that this is not an absolute direction to get the child vaccinated depending upon the Act itself, but directs the father to proceed according to the provisions of the Vaccination Acts then in force. Therefore that incorporates, as it were, the eighth section of the previous Act, and recognises its existence, and in my opinion they are to be read together as conversant with one offence, and the eighth section of the 26 & 27 Vict. c. 52, is in force. Notice must be served under that section in order to warrant the prosecution, but the ninth section of the 42 & 43 Vict. c. 70, provides that it need not be proved that notice was *received* by the father or person having the custody of the child. In fact the ninth section of the latter Act recognises the existence and binding force of the eighth section of the former Act. The ninth section is as follows:—"In any prosecution for neglect to procure the vaccination of a child, it shall not be necessary in support thereof to prove that the defendant had *received* notice." It does not dispense with the service of the notice, but only dispenses with proof by the prosecutor that the parent received it.

On these grounds I think that the contention before the magistrates, and supported here by Mr. Osborne, was right, that there was but one offence, and that as to the second alleged offence and conviction therefor, the *certiorari* should go. I think it bears out our view that there may be a second prosecution under the provisions of the Public Health Act, but not a second prosecution for a distinct and substantive offence under the 42 & 43 Vict. c. 70.

ANDREWS, J.:—

I am of opinion that the writ of *certiorari* applied for by Andrew Vint, the prosecutor in this case, ought to go. His conviction on the 27th April, 1901, for refusing and neglecting to have his child, Maggie Vint (born on the 24th December, 1899), vaccinated, appears to me to have been plainly a conviction for the same offence as he was convicted for on the 27th September, 1902. No question has been raised upon the form of this second conviction, which, without so deciding, I shall assume to be sufficient. The Act, 26 & 27 Vict. c. 52 (which I shall refer to as the Act of 1863), by its first section required (amongst others) the fathers and mothers of every child born in Ireland after the 1st January, 1864, as soon as practicable, and within *six* calendar months after the child's birth, to take the child or cause it to be taken to the medical officer of the dispensary district in which the child was resident, for the purpose of being vaccinated, unless previously duly vaccinated, and the medical officer was thereby required to vaccinate the child.

Section 8 of the Act of 1863 required the registrar of births and deaths in every district at or immediately after the registration of the birth of any child, who should not have been certified to him as having been vaccinated within six calender months after its birth, to give the prescribed notice (form C in the schedule to the Act) to (amongs others) the father or mother of such child, to have the child vaccinated within six months after birth; and the same section enacted that if after notice the person so noticed should not cause the child to be vaccinated, without any reasonable excuse for such omission, he should forfeit a sum not exceeding *ten* shillings. The first conviction of Andrew Vint on the 27th April, 1901, was under this section.

By the Amending Act of 42 & 43 Vict. c. 70 (which I shall refer to as the Act of 1879), the father or mother (amongst others) of every child thereafter born in Ireland was required by section 3, within *three* months after such child's birth, or as soon after as practicable, to take such child or cause it to be taken to the medical officer (as was required by the Act of 1863) to be vaccinated. And the 7th section of the Act of 1879 enacts that every parent or person having the custody of a child who neglects to take such

K. B. Div. 1903.

THE KING (VINT) v. JUSTICES OF DONEGAL.

Andrews, J.

child or cause it to be taken to be vaccinated, "according to the provisions of the Vaccination (Ireland) Acts," and does not render a reasonable excuse for his neglect, shall be guilty of an offence, and on conviction be liable to a penalty not exceeding *twenty* shillings. The 9th section of the same Act provides that in any prosecution for neglect to procure the vaccination of a child it shall not be necessary in support thereof to prove that the defendant had *received* notice from the registrar or any other officer of the requirements of the law in this respect. The Act of 1879 (see the second schedule) repealed the 1st section of the Act of 1863, but left the 8th section of that Act unrepealed; and, in my opinion, a new offence was not created by the 7th section of the Act of 1879. A new offence cannot be created without clear words, and I think all that the Act of 1879 can be held to have done, in this respect, was to amend the Act of 1863 by reducing the six months to three months; by increasing the maximum penalty from ten to twenty shillings; and by rendering it unnecessary in the prosecution for the neglect in question to prove that the defendant *received* the registrar's notice. I do not, however, construe the 9th section of the Act of 1879 as abolishing the registrar's notice, the reasonableness of serving which is apparent. Under the similar English enactments it was decided in the case of *Pilcher* v. *Stafford* (1) in 1864, that continued neglect after the first penalty did not amount to a further breach of the statute, and continued neglect was provided for by the 147th section of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52, Royal assent, 8th August, 1878), under which the registrar or other officer therein referred to may enforce the provisions of the Irish Vaccination Acts by summoning (amongst others) the father or mother of the child to appear before a Justice of the Peace, and obtain an order directing the child to be vaccinated within a certain time, neglect to comply with the order involving a penalty not exceeding twenty shillings. Under this section the vaccination of a child may be enforced by repeated convictions for non-compliance with repeated orders: see *The Queen* v. *The Justices of Portsmouth* (2), decided on the corresponding section of the English

(1) 4 B. & S. 775. (2) [1892] 1 Q. B. 491.

Act, 30 & 31 Vict. c. 84, s. 30. The existence of the provision referred to in the 147th section of the Public Health (Ireland) Act, 1878, is, in my opinion, an additional reason for holding that a new offence was not created by the 7th section of the Act of 1879.

The question which arises in this case also arose in the case of *The Guardians of the South Dublin Union* v. *Glynn* (1), in 1897, which came before the Lord Chief Baron, the late Mr. Justice Murphy, and myself, on the 15th February in that year, when counsel for the Guardians admitted that he could not sustain the case against the defendants. After a reference to the Acts, and to the authorities, the Court decided accordingly, and (as I continue to think) rightly; but, under the circumstances of that case, I do not think the decision could be regarded as binding on a differently constituted Court, even on the same question.

In the present case, however, the second conviction of Andrew Vint on the 27th September, 1902, ought, in my opinion, to be quashed.

KENNY, J.:—

I concur.

Solicitors for the prosecutor: *Sir F. H. Miller & Co.*
Solicitors for the Guardians: *Wilson & Sims.*

J. L.

(1) Unreported.

K. B. Div.
1903.

RICE *v.* WHITE (1).

June 8, 17. *Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *ss.* 2, 107—*Nuisance —Abatement—"Owner"—Premises let at a rack-rent.*

F. held certain premises in the city of Dublin under a lease from A., at the yearly rent of £34. The poor law valuation was £38. F. had sublet portions of the premises to weekly tenants, and received from these lettings £107 a year. F. was herself in occupation of the residue of the premises, the letting value of which was estimated at £19 10*s.* a year:—

Held, that F. was the owner of the premises within the meaning of the Public Health (Ireland) Act, 1878, and liable under that Act to execute structural sanitary repairs.

Bowen v. *James* (10 L. R. Ir. 26) followed and applied.

Special Case stated by the Recorder of Dublin, under 41 & 42 Vict. c. 52, sect. 269 (7).

The matter came before the Recorder on an appeal by the defendant from an order made by Mr. Mahony, Divisional Magistrate, on the hearing of a summons, in which Thomas Rice, an inspector of nuisances on behalf of the Urban Authority of the city of Dublin, was complainant, and Richard White, the owner of certain premises in the city of Dublin, was defendant, ordering the defendant to construct within fourteen days proper pipe house drains, and water closets, and to abolish an ashpit. The following are the material facts as found by the Recorder:—The alleged condition of the premises existed and constituted a nuisance. The preliminary notice to abate the alleged nuisance pursuant to the Public Health (Ireland) Act, 1878, had been duly served on the defendant, and he had not abated the nuisance. The annual value of the premises under the Valuation Acts was £38. By indenture of lease dated the 17th July, 1899, the house and yard known as No. 24, Phœnix-street, with yard, stable, and out-houses, were demised to Mary Fogarty, for thirty-one years, from the 19th January, 1889, at the yearly rent of £34, the lease

(1) Before Palles, C.B., and Barton and Wright, JJ.

containing a covenant by the lessee to keep all buildings, drains, &c., in good repair. Lady Annally was now tenant for life of the premises subject to this lease, and the defendant was the person for the time being receiving the rent reserved by the lease, as agent for Lady Annally. The premises comprised in the certificate of valuation and in the said lease were identical. Mary Fogarty herself occupied the three top rooms and a closet (not a water-closet), but the residue of the premises contained in the lease, comprising a house and two cottages, were let by her to weekly tenants, from whom she received rents amounting in all to £107 18*s.* a year, there being in all eleven separate tenancies under her, and about forty-seven persons living in these. The letting value of the rooms retained by Mrs. Fogarty in her own possession was £19 10*s.* a year. Mrs. Fogarty was responsible for the repairs necessary for keeping the premises in a sanitary and habitable state under the leases, and also for any loss on vacancies and change of tenancies. The Recorder decided that Mary Fogarty was the owner within the meaning of the Public Health (Ireland) Act, 1878, and reversed the decision of the Divisional Magistrate, but stated the present case for the decision of the King's Bench Division, the question for decision being who was the owner, within the meaning of the Public Health Act, of the premises in question, and responsible for the structural repairs within the Act.

Philip A. O'C. White (with him *Ignatius J. O'Brien, K.C.*), for Thomas Rice:—

The summons was issued under sect. 110 of the Public Health (Ireland) Act, 1878, which makes the owner of premises liable to abate a nuisance arising from want or defective construction of any structural convenience. By section 2 of the same Act "owner" means the person for the time being receiving the rack-rent of the premises, whether on his own account or as agent or trustee for another person, or who would so receive the same if the premises were let at a rack-rent; and rack-rent means a rent not less than two-thirds of the full net annual value of the property out of which the rent arises, as ascertained under the Acts relating to the valuation of rateable property in Ireland. For the purpose, there-

K. B. Div. 1903. RICE v. WHITE.

fore, of ascertaining whether a rent is a rack-rent or not, it must be compared with the Poor Law Valuation, and it follows that the rent must issue out of all the premises included in the certificate of valuation. *Bowen* v. *James* (1) is distinguishable; it does not appear from the report of that case that any portion of the premises was in the occupation of the defendant. No doubt it would appear from what is stated in the judgment of Mr. Swifte in *Travers* v. *Askin* (2), that in *Bowen* v. *James* (1) the defendant was himself in occupation of a small shed, but apparently this shed was of no letting value, while here the unlet premises are found to be of a letting value of £19 10*s.* a year. *Truman, Hanbury, Buxton & Company* v. *Kerslake* (3) was a decision under the Public Health (London) Act, 1891; the definition of rack-rent in section 141 of that Act is different from that in the Public Health (Ireland) Act, 1878. Under the London Act the Court, for the purpose of determining what is a rack-rent, may inquire what rent a tenant may be reasonably expected to pay, but under the Irish Act the Court is bound strictly by the Poor Law Valuation. [He referred to *Smith* v. *O'Brien* (4); *Hildige* v. *O'Farrell* (5).]

W. G. Gibson, for Richard White :—

The present case is covered by *Bowen* v. *James* (1). [He referred to *Truman, Hanbury, Buxton & Company* v. *Kerslake* (3) and *Cook* v. *Montague* (6).]

O'Brien, K.C., in reply :—

The owner is the person nearest the occupation who receives the rack-rent. The present case cannot be distinguished from that of a person in occupation of a house letting portion of it in lodgings; notwithstanding such letting he is still deemed in occupation of the whole. [PALLES, C.B.: Has not the Recorder found as a fact that these persons in actual occupation are tenants?] No doubt he has, but I submit that the whole question is open on the facts as stated. If necessary I would ask, since no appeal lies in the

(1) 10 L. R. Ir. 26.
(2) 34 I. L. T. R. 58.
(3) [1894] 2 Q. B. 774.
(4) 29 I. L. T. R. 140.
(5) 6 L. R. Ir. 493.
(6) L. R. 7 Q. B. 418.

present case, to have the matter argued before a specially constituted Court.

K. B. Div. 1903.

RICE v. WHITE.

June 17.

Cur. adv. vult.

PALLES, C.B.:—

Parts of a single tenement are in the occupation of several sub-tenants of one Mary Fogarty, and the residue is in her own occupation. She holds under Lady Annally (whose agent is Mr. White, the respondent), at a rent which exceeds two-thirds of the valuation. The question is, who is "owner" of this tenement, within the meaning of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), and, as such, liable under that Act to execute structural sanitary repairs?

In *Bowen* v. *James* (1) the identical question arose; and the decision there was, that the person there in the position of Mary Fogarty here, viz. the person receiving the rents from the sub-tenants of such portion of the tenement as was let, was the "owner," although she herself was in possession of part.

This decision was pronounced in 1881, and the question has not since been re-agitated in the High Court, but, owing to some misconception of that decision, in consequence of no reasons having been given for it, and of the omission in the report of the statement in the special case, that part of the premises was in the actual occupation of the mesne lessor, one, at least, of the Divisional Magistrates in Dublin, and even, it is said, some County Court Judges, have held that, under such circumstances, the "owner" is not the person receiving the rents from the sub-tenants, but is the person in the position of Lady Annally here. The learned Recorder of Dublin, on an appeal from the decision of a Divisional Magistrate, has acted upon *Bowen* v. *James* (1), and this case has been stated to obtain the opinion of this Court whether he was right in so doing.

We considered it our duty, in the first instance, to inspect the original special case in *Bowen* v. *James* (1), in order that there should no longer be any doubt as to the circumstances of that case; and having done so, we found that the fact of the mesne

(1) 10 L. R. Ir. 26.

K. B. Div. 1903. RICE v. WHITE. Palles, C.B.

landlord, the defendant there, being in actual occupation of part of the premises, is twice prominently stated in the special case.

Of course, then, the learned Recorder was right. He, and every other inferior tribunal in the country, was, and is, bound by *Bowen* v. *James* (1), and I regret that, before any such tribunal declined to follow it upon the ground suggested, it should not have required the original record, which is open to the inspection of everybody, to be examined, to ascertain whether the suggested ground of distinction had any foundation in fact.

It only remains to determine whether we will follow *Bowen* v. *James* (1). As an appeal does not lie in the present case, it may be that, although one would have lain from the decision in *Bowen* v. *James* (1), we are not absolutely bound by that decision; but to overrule it, it would be necessary, according to our practice, to have a Court specially constituted for that purpose: otherwise, we would have no certainty of decision. This is the course adopted by our Court of Appeal in registration cases. I have carefully considered the question, with a view to see whether we should ask the Chief Justice to constitute such a Court, and I have arrived at the conclusion that there is no reasonable ground for impeaching the decision.

The definition of "owner," in section 2, is "the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used . . . or who would so receive the same if such lands or premises were let at a rack-rent."

"Rack-rent," in its turn, is defined to mean "rent which is not less than two-thirds of the full net annual value of the property out of which the rent arises, as ascertained under the Acts relating to the valuation of rateable property in Ireland."

As there may be many mesne landlords of the one tenement, each paying to his superior landlord, and receiving from a mesne landlord, rents of different amounts, each of which exceeds two-thirds of the valuation, there may be, and, as a matter of fact, there often are, in respect of the one tenement, several rents which, at the one time, answer this description of "rack-rent," and consequently there may be many different persons who, at the

(1) 10 L. R. Ir. 26.

same one time, are within the literal definition of "owner." Express words, therefore, ought to have been introduced into this definition of "owner," to designate which particular one of those many persons was to be the "owner." The Act failed to do this; and the Court had to supply, by construction, the implied words which ought to have been expressly stated. Words to this effect were so supplied by the Court in *Bowen* v. *James* (1), in which the decision was that, of the many persons within the definition, the person nearest to the occupation should be deemed the "owner." This implication was, in my opinion, plainly right; and, indeed, it has not been argued that it was not.

Then comes the question argued here, which is this: two-thirds of the valuation is an amount under £26 a year. Mrs. Fogarty receives, out of parts of these premises, rents amounting to £107 18*s.* a year, and is in actual occupation of the residue of the premises, which are found to be of the letting value of £19 10*s.* a year. Is she, or is she not, "owner"? It is said that not only is the £19 10*s.* not to be taken into consideration in calculating the value of the premises occupied by her, but that, because she is in occupation of part thereof, she is not within the definition.

In calculating the rent she receives out of the tenement, I leave out of consideration the £19 10*s.*, as to determine annual value, as distinct from rent receivable, recourse can be had only to the valuation; but the £107 18*s.* is plainly a rack-rent, unless it is essential, to constitute a rack-rent, that it should issue out of every part of the premises.

It is expressly admitted that, when separate parts of one tenement, *such separate parts comprising the entire tenement*, are let at separate rents to different persons, the aggregate of these rents can amount to a "rack-rent" within the section, and yet none of such rents issue out of the entirety of the premises. I think a contrast is drawn by the definition between, on the one hand, the amount of two-thirds of the valuation, and on the other, the aggregate amount receivable, or which, if all the premises were let at a rack-rent, would have been receivable; subject to this one

(1) 10 L. R. Ir. 26.

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qualification, that the value of the unlet portions must be ascertained by the valuation. The whole of the premises comprises each part of them, and what is received out of the whole is for the purposes of this definition received out of the premises. In other words, "premises" in it is to be read distributively. It follows that the occupation by the mesne landlord of part of the premises does not prevent her from being "owner," provided the rent she receives out of the residue of the premises is not less than two-thirds of the valuation.

I wish to observe that the learned Recorder has found as a matter of fact that the persons in occupation are sub-tenants; and I desire to guard myself against expressing any opinion as to who would be "owner" if the persons from whom Mrs. Fogarty receives rents were lodgers, as distinguished from tenants.

The answer to the question will be that Mrs. Fogarty is the "owner," within the meaning of the Public Health Act.

BARTON and WRIGHT, JJ., concurred (1).

Solicitor for Thomas Rice: *Ignatius J. Rice.*
Solicitors for Richard White: *W. J. Bradley & Son.*

J. G. T.

(1) NOTE.—The special case in *Bowen* v. *James* contained the following statements:—"The defendant does not himself occupy the said premises (save a very small portion which he uses as a store), but the same are let by him to weekly tenants, and the defendant receives said tenants' rents, and has a profit." "A small shed adjoining No. 6 Fleet Market is used by the defendant as a store, and is the only portion of the premises not sublet."—[REP.]

EX PARTE CRAWFORD *v.* M'SWINEY (1).

K. B. Div. 1903. Feb. 25.

Local government—Compulsory acquisition of lands—Arbitration—Power of arbitrator to determine amount of compensation—Lands Clauses Acts—Housing of the Working Classes Act, 1890, *sch.* 2, *clause* 7.

By a Provisional Order of the Local Government Board, incorporating the 2nd schedule to the Housing of the Working Classes Act, 1890, a local authority was empowered to take lands compulsorily. An arbitrator was appointed. Evidence was given before him on behalf of the occupier of certain lands proposed to be taken that his interest therein was of a certain value. Evidence was given on behalf of the local authority valuing his interest at a less sum. The arbitrator inspected the lands, and awarded as compensation a sum less than the value as appearing from the evidence given on behalf of the local authority:—

Held, that he was at liberty to do so, and was not confined within the limit of the amounts at which the interest was valued on behalf of the occupier and the local authority respectively.

THE Strabane No. 2 Rural District Council were the promoters of a scheme for the erection of labourers' cottages, and had obtained a Provisional Order (afterwards duly confirmed) from the Local Government Board, under the Labourers' Acts, 1883 to 1896, empowering them to put in force the powers of the Lands Clauses Acts, with respect to certain lands. The Order defined the Lands Clauses Acts as meaning the provisions of the Lands Clauses Acts as amended by the provisions of the 2nd schedule to the Housing of the Working Classes Act, 1890. Mr. John H. M'Swiney was appointed by the Local Government Board arbitrator to decide the differences between the District Council and occupiers of lands acquired under the Order. Mr. Thomas Crawford, the claimant, was in possession of a plot of land, comprising half an acre, proposed to be acquired under the Order, which was held by him with other lands under a judicial tenancy. No offer was made to him by the District Council of any sum for

(1) Before LORD O'BRIEN, L.C.J., and MADDEN, BOYD, and KENNY, JJ.

K. B. Div. 1903. *Ex parte* CRAWFORD.

this plot, nor was he ever asked by them to state what sum he would take for it. The arbitrator duly held a sitting, at which Crawford attended, and evidence was given by Crawford and other witnesses on his behalf valuing his interest in the plot at £60 10*s*. The only witness called on behalf of the District Council valued the claimant's interest at £35. The day following the arbitration the arbitrator inspected the lands and awarded as the price to be paid by the District Council to the plaintiff for his interest the sum of £11 9*s*. 2*d*., and £5 for injury for severance. The arbitrator in an affidavit made by him on the present motion stated that the evidence given at the arbitration sitting in support of the claim was not borne out by the general evidence given of the selling value of tenants' interests in the neighbourhood, and that his decision was the result of his personal examination of the lands, coupled with the evidence given before him.

Thomas Crawford now applied on notice for a writ of *certiorari* to bring up and quash so much of the award and the schedule thereto as related to the price to be paid for his interest in the lands in question.

Wylie, K.C. (with him *Patchell*), for the applicant:—

By clause 7 of the 2nd schedule to the Housing of the Working Classes Act, 1890, in disputed cases the arbitrator is to ascertain the amount of compensation demanded by the claimant and the amount which the local authority is willing to pay, and after hearing the parties interested is to decide on the amount of compensation to which he considers the claimant entitled. In the present case the value put on the land by the claimant's witnesses must be deemed the amount demanded by him, and the value given by the witness for the District Council the amount they were willing to pay. The function of the arbitrator is to settle the dispute between the parties, and the dispute here is confined within the limits of those two amounts.

Henry, K.C. (with him *Barnhill*), for the arbitrator:—

The concluding portion of clause 7 of the 2nd schedule to the Housing of the Working Classes Act, 1890, shows that the power of the arbitrator cannot be limited in the manner suggested.

LORD O'BRIEN, L.C.J. :—

We are all of opinion that Mr. Wylie's contention is not sustainable. His argument is that the effect of clause 7 of the schedule to the Housing of the Working Classes Act, 1890, is to place the arbitrator in what may be termed a "watertight compartment." But this argument ignores the latter part of the clause, which provides that, "after hearing all such parties interested in each disputed case as may appear before him at a time and place of which notice has been given as in Part I. of this Act mentioned, he shall proceed to decide on the amount of compensation to which he may consider the claimant to be entitled in each case." This plainly shows that the arbitrator is not confined within certain limits, but is to decide the amount *to which he may consider the claimant entitled*. My brother Kenny put the question to Mr. Wylie—"Suppose that the compensation had exceeded £1000, and an appeal had been allowed, would the jury be confined in this watertight compartment?" Mr. Wylie was not able to contend that they would. The application must be refused.

Solicitor for Thomas Crawford: *Thomas Elliott.*
Solicitors for J. H. M'Swiney: *Wilson & Sims.*

J. G. T.

Appeal.
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April 23, 24.
May 18.

THE KING (O'REILLY) *v.* JUSTICES OF FERMANAGH (1).

Loan Fund Society—Promissory note—Statute of Limitations—Petty Sessions (Ireland) Act, 1851 (14 *&* 15 *Vict. c.* 93), *sect.* 10, *sub-sect.* 4—6 *&* 7 *Vict. c.* 91—63 *&* 64 *Vict. c.* 25.

Proceedings by the treasurer of a loan society to recover the amount of promissory notes made for the repayment of loans under the Loan Societies (Ireland) Act, 1843, are subject to the provisions of sect. 10, sub-sect. 4, of the Petty Sessions (Ireland) Act, 1851, and must be brought within six months from the time when the cause of action arose.

Decision of King's Bench Division in *Atthill* v. *Woods* ([1903] 2 I. R. 305) affirmed.

Appeal by Edward O'Reilly, receiver of the Pettigo Loan Fund Society, from an order of the King's Bench, dated the 29th January, 1903, discharging a conditional order for *certiorari* obtained by O'Reilly to quash orders made by the Justices dismissing summonses brought by O'Reilly to recover sums due on certain promissory notes. There were forty-one summonses brought before the Justices on the 28th October, 1902, and the magistrates refused to give decrees on the ground that a copy of the rules of the Loan Fund in question had not been lodged with the clerk of Petty Sessions, pursuant to section 14 of the Loan Funds Societies Act, 1843. This point was not argued in the King's Bench, but the question argued there was as to whether the six months' limitation in section 10, sub-section 4, of the Petty Sessions Act, 1851, applies to promissory notes issued by Loan Fund Societies. The King's Bench held that the debts were barred on the ground that the summonses were not issued until more than six months after the promissory notes sued on became due, under section 10 (4) of the Petty Sessions Act, 1851. In this

(1) Before Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.

the King's Bench followed their decision in *Atthill* v. *Woods* (1). Edward O'Reilly appealed against that order. The respondent Hugh Martin was the only one of the defendants who showed cause against the conditional order being made absolute in the King's Bench. The note on which he was sued was for £3, dated the 6th June, 1896, while the summons was issued on the 31st May, 1902.

Campbell (*Solicitor-General*), *O'Connor*, *K.C*, and *Pringle*, for the appellant:—

The Petty Sessions Act does not apply to a Loan Fund note. Proceedings can be taken for recovery of the amount due on one of these notes, notwithstanding that a period of six months has elapsed: *Rex* v. *Justices of Fermanagh* (2).

The Charitable Loan Societies Act, 1843 (6 & 7 Vict. c. 91), is a code, and provides exclusive jurisdiction for this form of debt: *Moore* v. *Donagher* (3); *Armstrong* v. *Orr* (4). The Act 63 & 64 Vict. c. 25, was passed to cure certain defects with respect to notes of Loan Fund Societies. A note current or unpaid on the 1st March, 1899, could be enforced, notwithstanding the lapse of time, within six months after the passing of the Act, otherwise the Act would be inoperative.

Horner and *Henry*, *K.C.*, for the respondent:—

The sole remedy of the plaintiff was by complaint before the Justices under section 30 of the Charitable Loan Societies Act, 1843: *Moore* v. *Donagher* (3). The Petty Sessions Act, 1851, is therefore to be read along with the Act of 1843. Section 3 of the Charitable Loan Societies Act, 1900, incorporates the Petty Sessions Act, 1851, as to forms and costs. The mode of service prescribed by section 30 of the Act of 1843, and by section 12 of the Petty Sessions Act, is the same.

Section 10, sub-sect. 4, of the Petty Sessions Act, 1851, is an amplification of the corresponding sections in the earlier repealed Acts, namely (11 & 12 Vict. c. 43, s. 11, and 12 & 13 Vict. c. 70,

(1) [1903] 2 I. R. 305.
(2) 35 I. L. T. R. 146.
(3) [1903] 2 I. R. 290.
(4) 31 I. L. T. R. 118.

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s. 11), in which the time limit for all summary complaints was six months from the date upon which the complaint arose. See also the Summary Jurisdiction Act, 1851 (14 & 15 Vict. c. 92, sects. 1 and 44); and the Interpretation Act, 1889, s. 13.

[They cited *Fiddes* v. *Mohan* (1); *Rex* (*Maxwell*) v. *Justices of Fermanagh* (2); *Atthill* v. *Woods* (3); *Enniskillen Loan Fund Society* v. *Green* (4); *Harpin* v. *Sykes* (5); *Morant* v. *Taylor* (6); *Tottenham Local Board* v. *Rowell* (7); *West* v. *Downman* (8); *Vestry of Hammersmith* v. *Lowenfeld* (9); Stone's Justice's Manual, 36, 354.]

May 18.

LORD ASHBOURNE, C.:—

This case comes before us on appeal from the King's Bench Division, and is, we are told, important, as its decision may possibly involve grave consequences to the Loan Fund Board, who may have many other cases involving the same question.

The question raised is short and simple, and comes to this, whether the limitation of time imposed by section 10, sub-sect. 4, of the Petty Sessions Act, 1851, applies to proceedings under section 30 of the Charitable Loan Societies Act, 1843. That sub-section is as follows:—

> "In all cases of summary jurisdiction the complaint shall be made when it shall relate to the non-payment of any poor rate, county rate, or other public tax, at any time after the date of the warrant authorising the collection of the same, and when it shall relate to the non-payment of money for wages, hire, or tuition, within one year from the termination of the term or period in respect of which it shall be payable . . . and in any other case within six months from the time when the cause of complaint shall have arisen, but not otherwise."

The closing words of the sub-section were held by the King's Bench Division to apply to the present case, and this decision is challenged by the appellants.

(1) 36 I. L. T. R. 188.
(2) 35 I. L. T. R. 146.
(3) [1903] 2 I. R. 305.
(4) [1898] 2 I. R. 103.
(5) 1 *Times* R. 307.
(6) 1 Ex. Div. 188.
(7) *Ibid.* 515.
(8) 14 Ch. D. 111.
(9) [1896] 2 Q. B. 278.

A complaint before Justices is the exclusive remedy for recovering money due upon notes under the Act of 1843, *Moore* v. *Donagher* (1), and therefore the sub-section would seem *prima facie* to apply. It has, however, been argued that this is not an ordinary case, but one where the remedy is by complaint before Justices, not by virtue of their ordinary magisterial functions, but under an express statutory provision, and that therefore the sub-section does not apply except in the cases specially enumerated. This would appear to me to be a very forced construction, and to entirely ignore the plain meaning of the words "in any other case." It first sets out certain limitations in cases in which the jurisdiction is wholly statutory, and then provides that "in any other case" the period of limitation is to be six months. It appears to me to be simply impossible to hold that these words mean merely cases in which the jurisdiction is not statutory. The whole argument is based upon an obvious fallacy. It must be remembered that the main summary jurisdiction of Justices is, in fact, statutory, and that there is nothing special or exceptional in the Loan Fund jurisdiction being assigned by statute to Justices.

The suggestion that the defect is cured by the Act of 1900 does not stand the test on any examination of its words. There are no words that can be so construed. The Act specifically names and cures a large number of defects and omissions with regard to these notes, but leaves the period of limitation quite untouched. The decision in *Maxwell's Case* (2) does not appear to have any bearing on the point now raised, as it merely decided that the period of limitation in the case of notes validated by the Act did not begin to run till the date that the Act came into force. The question raised by this case had previously been before the King's Bench Division in *Atthill* v. *Woods* (3), when it was decided that the six months' limitation did apply, and I think that decision entirely correct. It is worthy of note that the corresponding English Act contains a similar provision, which has in many cases been held to apply to statutory jurisdiction analogous to that in question here; and counsel for the respondent have referred in

(1) [1903] 2 I. R. 290. (2) 35 I. L. T. R. 146. (3) [1903] 2 I. R. 305.

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support of this view to *West* v. *Downman* (1), decided by the Court of Appeal in England, and *Harpin* v. *Sykes* (2).

I am accordingly of opinion that the judgment of the King's Bench Division is right, and should be affirmed with costs.

FITZ GIBBON, L. J. :—

The Act of Parliament, if clear, must be obeyed, whatever the result may be, and in my opinion there is no reasonable doubt as to its construction.

The Petty Sessions Act, sect. 10, sub-sect. 4, applies to "all cases of summary jurisdiction" by its opening words. It then proceeds to specify certain cases, and finally it enacts that "in any other case" the limitation of six months shall apply. This subdivision is exhaustive, and it must include every case in which the Justices have summary jurisdiction, unless otherwise excluded. They have summary jurisdiction under the Loan Fund Act, and in exercising it they are, in the absence of any provision to the contrary, controlled by the Petty Sessions Act, section 10, subsect. 4.

The note in the present case does not belong to the class of promissory notes which were *sub modo* validated by the Act of 1900, nor does it appear to have suffered from any of the defects which that Act remedied. It might, perhaps, be contended that a note otherwise validated by the Act of 1900 would get what I may call a new lease of life, or a fresh start, in respect of the six months limitation, but I cannot hold that the Act of 1900 revived a right to sue upon a note to which it did not otherwise apply.

HOLMES, L. J. :—

Charitable Loan Societies seem to have been an old institution in Ireland, and since the year 1823 they have been the subject of several statutes. The Act now regulating them is 6 & 7 Vict. c. 91, which repeals all previous enactments, and lays down elaborate provisions for their creation and management.

Section 25 prescribes the form of the notes or securities to be

(1) 14 Ch. D. 111. (2) 1 *Times* R. 307.

taken by a Loan Society for money advanced; and section 30 enacts where there is default in payment that the debt may be enforced by summary procedure either before one Justice of the Peace, or at Petty Sessions. It has been held by the King's Bench Division that this is the only remedy for recovering the amount of the loan—*Moore* v. *Donagher* (1); and this carefully considered decision has been neither questioned nor criticised during the argument of this appeal. The sole point in controversy is, whether the summary proceedings must be commenced within six months from the time when the promissory notes became payable. There is not in the Act of 1843, nor, I believe, in any of the previous statutes repealed thereby, a period limited for the enforcement of the sum due; and unless the law has been since changed, the summons in the present case was served in time. I am satisfied, however, that it has been changed. The Act 12 & 13 Vict. c. 70, was passed, as appears from its preamble, to consolidate, with such additions and alterations as might be deemed necessary, the statutes relating to the duties of Justices in Ireland in respect of summary convictions and orders, including, as the 8th and other sections show, orders for the payment of money made upon complaints in that behalf. Section 11 enacts that in all cases where no time is already or shall hereafter be specially limited for making any complaint, or laying any information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose. No explanation of this section could be clearer than its own language. No time was specially limited in the Act of 1843 for making the complaint mentioned in the 30th section thereof in case of a borrower failing to pay his note or security in the manner agreed on; and, therefore, on the passing of the Act of 1849 it became necessary to make such complaint within six calendar months from the time when the matter of complaint arose. The 11th section, which I have quoted from the Irish Act of 1849, is in the same terms as the 11th section of the English statute of the previous year: 11 & 12 Vict. c. 43; and

(1) [1903] 2 I. R. 290.

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Mr. Henry, in the course of his argument, and Gibson, J., in his judgment in *Atthill* v. *Woods* (1), have referred to several cases showing with what strictness the time limit therein prescribed has been applied to every branch of summary jurisdiction. The Act of 1849 only remained in force for two years, when it was repealed by the Petty Sessions (Ireland) Act, 1851, passed to consolidate and amend the Acts regulating proceedings at Petty Sessions and the duties of Justices of the Peace out of Quarter Sessions in Ireland. As might be expected, this statute contains most minute provisions as to the time limit within which complaints must be brought. Section 10, sub-section 4, enacts that in all cases of summary jurisdiction the complaint shall be made, when it relates to the non-payment of certain rates and taxes at any time after the dates of the warrant authorizing their collection: when it relates to the non-payment of money for wages, hire, or tuition, within one year from the termination of the period in respect of which it is payable: when it relates to trespass, within two months from the time when the trespass shall have occurred; and in all other cases within six months from the time when the cause of complaint shall have arisen, but not otherwise. Is it possible to introduce into the clearly universal words with which this clause concludes an exception in favour of complaints for non-payment of notes or securities under the Loan Fund Act of 1843? I am of opinion that it is not; and that the question raised in this case could not have been argued previous to the passing of the Charitable Loan Societies (Ireland) Act, 1900.

We can gather from the provisions of that statute the circumstances that led to its enactment. The management of these societies in this country had been for a long time characterized by ignorance and carelessness; and in and subsequently to the year 1896 there was a series of authoritative decisions that many of their securities were irrecoverable on one or other of the grounds specified in the 1st section of the Act. In the result their financial position was seriously endangered; and the Act of 1900 was passed for the purpose of enabling them to recover sums of money that had been borrowed and not been repaid, notwithstanding

(1) [1903] 2 I. R. 305.

certain illegalities and irregularities in the way in which the loans were made. It is to be noted that there is nothing on the face of the Act to show that any embarrassment had arisen from the six months' limitation. There is no reported, and as far as I am aware no unreported, case in which this question was discussed, and according to my experience, however defective the securities might have been in other respects, they were regularly renewed at short intervals—at least down to the year 1896, when the illegalities began to be discovered.

Now it is impossible to conceive that if the provision of the Petty Sessions Act as to bringing the complaint within six months applied previous to 1900 to notes given to Loan Societies, the Act of that year altered the law in this respect either expressly or by implication. As I have already said, it relates to a wholly different subject-matter; and it only applies to notes having one or more of the defects enumerated in the 1st section.

A note good and valid on the 1st March, 1899, is outside the scope and operation of this statute; and a note irrecoverable on that day for any reason other than those specified is given by it no new validity. I do not think, however, that counsel for the appellant rely on the Act of 1900 as altering the previous law. They rather use it for the purpose of showing that the period of limitation prescribed by the Petty Sessions Act never applied to summary proceedings for the recovery of debts due to Loan Societies. They say that the provisions of the later Act assume that such proceedings might be taken after a much longer interval, and that this Court ought to make a similar assumption. This would be a very dangerous principle to act on in construing a statute which for fifty years has been supposed to be free from doubt or ambiguity. It is a common complaint that Acts of Parliament are sometimes drafted and passed in ignorance of the existing law; but if this ignorance is to be used for the purpose of modifying the plain and well-understood meaning of previous enactments, the result must be hopeless confusion. It is, however, unnecessary in the present case to consider such an extreme proposition, as I am satisfied that there is nothing in the Act of 1900 from which the inference suggested by the appellant's

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counsel can be drawn. The 1st section relates to notes current or unpaid on the 1st March, 1899, which were incapable of being enforced by reason of certain specified defects. These notes could not have been sued on at all except by virtue of the Act, but its enactment gave them validity. At that date there arose for the first time a cause of action in respect of them, and the period within which proceedings were to be taken ran therefrom. But there is nothing in the Act that revives a note otherwise good if barred by lapse of time. The statute does not apply to such notes. They could have been sued on, irrespective of the Act of 1900, up to the expiration of the period limited for proceedings, and they could not be enforced after that period, whether it came to an end before or subsequent to the 1st March, 1899. The draftsman did not concern himself with a time limit which was foreign to his purpose. He left it as it was, with the result that certain invalid notes which became recoverable for the first time on the passing of the Act could be sued on within the six following months. As far as I can see, the Act would have been drafted in the same way whether the time limited for a complaint had been six months or six years; and no inference in favour of one period more than of another, or indeed in favour of any period, can be drawn from its provisions. I am therefore of opinion that the appeal should be disallowed.

The Lord Chancellor stated that Lord Justice Walker, who had heard the argument, but who was unavoidably absent, concurred in the judgments.

Solicitors for the Loan Fund Board: *E. & G. Stapleton.*
Solicitor for the defendants: *L. R. Lipsett.*

R. D. M.

KEVIN E. O'DUFFY *v.* JAFFE, SURGEON DENTISTS, LTD.
SAME *v.* S. JAFFE.
SAME *v.* M. L. JAFFE (1).

K. B. Div. 1903. Nov. 5, 6, 20.

Dentist—Registration—Taking or using the name—Person—Company—Dentists Act, 1878 (41 & 42 *Vict. c.* 33)—*Interpretation Act* (52 & 53 *Vict. c.* 63).

The word "person" in the Dentists Act, 1878, relates only to an individual, and does not embrace a corporation or company. A company, by assuming a name which includes the words "surgeon dentists," does not become liable to a prosecution under the Act for using a name, title, addition, or description, implying that it is registered under the Act.

CASES stated by the magistrates at Limerick Petty Sessions in three prosecutions at the instance of Kevin E. O'Duffy against a corporation entitled "Jaffe, Surgeon Dentists, Limited," and two individuals, S. Jaffe, and Marcus L. Jaffe.

The case stated in the first prosecution set out that at Limerick Petty Sessions on the 28th May, 1903, the defendants Jaffe, Surgeon Dentists, Limited, were charged with having on the 9th February, 27th April, and 15th May, 1903, at Limerick, taken and used the name, title, addition, or description of dentist and surgeon dentist, and the title or description of "The London and New York Dental Institute," implying that the defendant company was specially qualified to practise dentistry, the defendant company not being duly qualified in that behalf according to law or entitled to use the names, titles, additions, or descriptions aforesaid. The charge was duly heard before the magistrates, and upon such hearing they ordered that the summons be dismissed, with £1 costs. It was proved on the part of the complainant that the defendants were a registered company under the Companies Acts, 1862 to 1900, with a capital of £500, divided into 500 shares of £1 each, and registered on the 10th November, 1900. The memorandum of association, dated 5th November, 1900, set forth—(*a*) name of the Company, Jaffe, Surgeon Dentists, Limited; (*b*) registered office of the Company will be in Ireland; (*c*) objects of

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

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Company—to carry on the business of dentists and dental surgeons in such parts of the United Kingdom as the directors shall from time to time appoint, and, in particular, Limerick, Clonmel, &c.; (*d*) the following comprise the aforesaid Company—Benjamin Jaffe, 64, Colooney-street, Limerick, draper, 1 share; Edith Jaffe, same address, spinster, 1 share; Marcus L. Jaffe, 31, Westland-street, Limerick, dental mechanic, 1 share; Bertha W. Stein, 27, Westland-street, Limerick, married woman, 165 shares; William Stein, same address, draper, 1 share; Leah Jaffe, same address, married woman, 165 shares; Rachel Jaffe, 35, Catherine-street, Limerick, married woman, 165 shares; Celia Phillips, 67, Bridge-street, Leeds, married woman, 1 share. The directors were Lionel Jaffe, Mayer William Stein, and Benjamin Jaffe.

The office of the Company was in Cecil-street, Limerick, having over the door the inscription "Jaffe, Surgeon Dentists, Limited," and on a brass plate at the right-hand side of the door, "London and New York Dental Institute, conducted under the supervision of Messrs. Jaffe, Surgeon Dentists, Limited." The complainant proved the publication of an advertisement in the *Limerick Leader* newspaper of February 9 and May 15, 1903, in the name of Jaffe, Surgeon Dentists, Cecil-street, Limerick. Neither the Company nor the directors were registered in accordance with section 3 of the Dentists Act, 1878 (41 & 42 Vict. c. 33). Evidence was given by G. J. O'Callaghan, who on 27th or 28th April, 1903, went to the house 43, Cecil-street, Limerick, which had the foregoing inscriptions on the door, accompanied by his daughter. In a room upstairs he saw a man, and asked him if he was the dentist. This man replied that he was. O'Callaghan having explained that the girl was suffering from a bad tooth, the man took her to the surgery (an inner room), placed her in a chair and extracted the tooth. O'Callaghan paid him 2*s.* 6*d.*, for which he gave a receipt signed "S. Jaffe."

The magistrates further stated that it was contended before them by Mr. Samuels, K.C., on the part of the complainant, that the defendant company was formed for the purposes of evading the provisions of the Dentists Act, 1878. The word "person" in section 3 only applied to an individual, if read by itself, but in the year 1889 the Interpretation Act (52 & 53 Vict. c. 63) was

passed, and should be read with the former Act. Section 2, sub-section 1, there defined that the expression "person" should include a body corporate, unless the contrary appeared, and, consequently, as nothing appeared in the Dentists Act to specifically show the "contrary intention," the defendant company should be construed as a person within the meaning of the Dentists Act, and they should be convicted as having taken and used the title of dentists, implying thereby that they were registered under the Dentists Act, and that they were a "person" specially qualified to practise dentistry, when not so registered. In answer to this Mr. Healy, K.C., with whom were Messrs. Doyle and Cullinan, argued that, as only a natural person could be registered or pass an examination, the Act did not apply to a corporation. The Interpretation Act did not, and could not, refer to the Dentists Act, as the "contrary intention" mentioned in section 2, sub-section 1, was apparent by implication in numerous sections, viz. no corporate body could pass an examination or be registered, or be a licentiate in surgery, or serve on juries, inquests, corporate or parochial offices, or serve in the militia, or die. The Act only applied, and was only intended to apply, to a natural person, and not to a corporate body. (Sections 3, 4, 5, 11, 13, 14, 18, 30, 36, and 37.)

The magistrates were of opinion that the "contrary intention," as expressed in section 2, sub-section 1, of the Interpretation Act, did appear in the Dentists Act, 1878, and that the Act only applied to a natural person, and not to a body corporate. Accordingly, the complaint was dismissed.

The question for the Court was, whether the magistrates were correct in point of law in this determination, or as to what should be done in the premises.

In the separate complaints by the same complainant, charging S. Jaffe and Marcus L. Jaffe individually with the same offence, the magistrates being of opinion that these defendants did not personally take or use the word "dentist," or any other term implying that they were registered, dismissed the two complaints, with £1 costs in each case. These two complaints were the subjects of the separate cases stated, which were heard simultaneously with the original case.

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Gerald Fitz Gibbon (with him *Ronan, K.C.*, and *Samuels, K.C.*), for the complainant :—

The question is, whether the word "person" in section 3 of the Dentists Act, 1878, includes body corporate. There is no express interpretation of the word "person" in the Dentists Act, but *prima facie* the word "person" includes body corporate, and by the Interpretation Act, 1889, section 2, it must bear this meaning unless the contrary intention appears. The House of Lords having held in *The Pharmaceutical Society* v. *The Provincial Supply Association* (1) that the general context of the Pharmacy Act precluded the interpretation body corporate, the Legislature, in amending the Medical Acts in 1886, directed that in the Medical Acts the word "person" should include body of persons, corporate or not. Section 26 of that Act amends the Dentists Act, and the word "person" occurs in several places in the section so amended, and must, therefore, be construed persons corporate or not in that section. We rely upon the expression of opinion by the Legislature in 1886 as affording a light to the interpretation which it considered should have been put upon the Pharmacy Act, and we contend that that expression of opinion prevents the decision of the House of Lords from governing this case. In section 5 of the Dentists Act the word "person" must include body corporate. Otherwise a fraudulent company could sue for fees. In construing an Act of Parliament the duty of the Court is to ascertain the mischief at which the Act was aimed, and then to put such construction on it as may be necessary to effect the object of the Legislature : *Pharmaceutical Society* v. *The Provincial Supply Association* (1). (See judgments of Bramwell, L.J., at p. 313, Baggallay, L.J., at p. 317, and Thesiger, L.J., at p. 319, in the Court of Appeal, and Lord Selborne, at p. 866, and Lord Blackburn, at p. 869, in the House of Lords.)

The object of the Pharmacy Act was to prevent unqualified people from selling poison : *per* Lord Selborne, at p. 866, and Lord Blackburn, at p. 872 of 5 A. C. ; and the King's Bench Division held that the object was to prevent keeping open shop by unqualified people. They accordingly, in order to prevent this mischief, construed "person" as including body corporate.

(1) 5 Q. B. D. 310; 5 A. C. 857.

The Court of Appeal and the House of Lords were of opinion that keeping open shop was a minor matter, and that the real object was to prevent sale by unqualified people, which could be attained without giving the word "person" the wider interpretation. The Dentists Act does not forbid the practice of dentistry by unqualified people. It does forbid unqualified people from taking the name (section 3), and from suing for fees (section 5). It will fail to accomplish either of these objects unless the word "person" receives the wider interpretation. The object of the Act was, that when a member of the public saw the word "dentist" outside a place of business, he might expect, and ought to find, a qualified person within. If the company did not "take" the name of "dentist" within the meaning of section 3, at any rate they "used" it. (See advertisements in *Limerick Leader*.)

Lord Selborne's judgment at p. 459 of *Clifford* v. *Koe* (1) was also referred to.

Charles F. Doyle, and *T. M. Healy*, *K.C.*, for the defendants:—

Our proposition is that the word "person," as used in the Dentists Act, 1878, cannot include a body corporate. In the first place, the text of section 3, under which the prosecution was instituted, repels the possibility of giving the word "person" therein used any such construction, or any construction other than natural person. Secondly, the whole scope of the Act other than the 3rd section imperatively requires that the construction of the word "person," wherever it occurs, shall be so limited. Thirdly, this position is in no way affected by the Interpretation Act of 1889, inasmuch as the definition of "person" therein contained explains the meaning of that word, so as to be capable of comprising body corporate, only where no contrary intention appears. Fourthly, it is determined upon the authority of *The Pharmaceutical Society* v. *The Provincial Supply Association* (2), that the same word, in an Act in *pari materia*, the main provisions of which are practically identical with this Act, is to receive the construction that we contend for. The question of the individual prosecutions being a finding of fact by the magistrates, it is not open to this Court to consider it at all.

(1) 5 A. C. 447. (2) *Ibid.* 857.

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The defendants in saying that they are Jaffe, Surgeon Dentists, Limited, cannot be taken as implying that they are registered under an Act, under which, having regard to their corporate character, they could not be registered. The defendants have *added* nothing to their name; "Jaffe, Surgeon Dentists, Limited," *is* their name. [The following authorities were also referred to:—Encyclopædia of the Laws of England, vol. iv., p. 218; *Pharmaceutical Society of Ireland* v. *Boyd & Co.* (1); *Brown* v. *Whitlock* (2).]

Ronan, K.C., in reply.

Nov. 20.

Lord O'Brien, L. C. J.:—

The question in this case is, does the word "person" in the Dentists Act of 1878 mean exclusively natural person, or does it include an artificial person such as a corporation or company? I am of opinion that the word "person" is confined to natural person, and that it has no extended signification. I turn to the first part of the 3rd section, which is as follows:—"A person shall not be entitled to take or assume the name or title of "dentist" (either alone or in combination with any other word or words) or of "dental practitioner," or any name, title, addition, or description implying that he is registered under this Act, unless he is registered under this Act." These are the words of the first part of the 3rd section. What do these words mean? They mean that no person capable of being registered shall take the name or description implying that he is registered under the Act. That most plainly, in my opinion, deals with a natural person—a person who could be registered under the Act. There is no provision for the registration of a corporation or company, and, besides, the words "specially qualified" point to a natural person, "special qualification" being an apposite expression as regards a natural person, but wholly inapposite if applied to a corporation or company.

Now, take the second clause of the 3rd section on which the prosecution is founded. It is as follows:—"Any person, who.

(1) [1896] 2 I. R. 394. (2) 19 T. L. R. 524.

after the 1st day of August, 1879, not being registered under this Act, takes or uses any such name, title, addition, or description as aforesaid, shall be liable on summary conviction to a fine not exceeding £20." To my mind it is quite plain that the words "any person" in this clause are confined to natural person—to a person who could be registered and was not. Who, then, could be registered under this Act? The 6th section tells. It is as follows:—"Any person who is a licentiate in dental surgery or dentistry of any of the medical authorities." It is plain that licentiate does not include a corporation. Secondly, any person "who is entitled as hereafter mentioned to be registered as a foreign or colonial dentist." Who is entitled to be registered as such? That is provided by the 8th and 9th sections—persons who are, amongst other things, of *good character*—language inconsistent with the idea of a company. Thirdly, a person who "is at the passing of this Act *bona fide* engaged in the practice of dentistry, or dental surgery, either separately, or in conjunction with the practice of medicine, surgery, or pharmacy." What is the meaning of that? That means an actual practitioner—a natural person. It is plain, in my judgment, that a corporation or company could not be registered under the Act, and it is, I think, equally plain that a person who could not be registered was not liable to be prosecuted.

As to this, I may refer to some observations of Lord Blackburn in the case of *The Pharmaceutical Society* v. *The Provincial Supply Association* (1). He is reported to have said, in relation to the statute under consideration in that case, as follows:—"The Act then goes on, in the 1st section, which is, I think, really very important, to say: 'It shall be unlawful for any person to sell or keep open a shop for retailing, dispensing, or compounding poisons, or to assume or use the title chemist or druggist, or pharmacist, or dispensing chemist or druggist, in any part of Great Britain, unless such person shall be a pharmaceutical chemist or chemist and druggist.'" Then he goes on:—"Now, my Lords, standing there, it does seem to me, though without laying down any technical rule, that the plain meaning of the words is—and they

(1) 5 A. C. 857.

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are used in this sense—such a person as could become a pharmaceutical chemist." Applying that to this case, "such a person as could be registered under the Act," he goes on: "It seems to me, therefore, that the Act plainly says in the 1st section, 'It shall be unlawful to sell, or keep open shop, or assume the name of chemist or druggist for any person'—that is to say, any natural person—'unless he becomes a pharmaceutical chemist.'" That, I think, bears out entirely the proposition I have stated, that "person" must be a person who could be registered under the Act.

Turning again to the 3rd section, what does it mean, and what does the word "person" mean in that section? I shall read it again: "Any person who after the 1st day of August, 1879, not being registered under the Act, takes or uses any such name title, addition or description as aforesaid." "Person" in the section, I think, means a person who having one name takes another name or description, that is a natural person, who has his own name and adds to it another name or description. It would seem to me not to include a company which comes into being with a name and adds nothing to it. For my own part, I think that the 3rd section, taken by itself, shows that the word "person" is confined to natural persons, but, further, in my opinion, the whole Act from beginning to end shows that person does not include an artificial person such as a corporation.

Take the 4th section: "With respect to the offence of a person not registered under this Act taking or using any name, title, addition, or description as above, in this Act mentioned, the following provisions shall have effect:—(1). He shall not be guilty of an offence under this Act; (*a*) if he shows that he is not ordinarily resident in the United Kingdom and that he *holds a qualification* which enables him to practise dentistry or dental surgery in a British possession or foreign country, and that he did not represent himself to be registered under this Act." That is dealing altogether with a natural person who can be qualified. Then (*b*) "if he shows that he has been registered and continues to be entitled to be registered under this Act, but that his name has been erased on the ground only that he has ceased to practise," dealing with an actual personal practitioner.

Now, there is the 5th section, which was referred to, relied upon by Mr. Fitz Gibbon and Mr. Ronan. Here it is: "A person registered under this Act shall be entitled to practise dentistry and dental surgery in any part of Her Majesty's dominions, and from and after the 1st day of August, 1879, a person shall not be entitled to recover any fee or charge in any Court for the performance of any dental operation or for any dental attendance or advice, unless he is registered under this Act or is a legally qualified medical practitioner." It is argued that this section may be evaded if a corporation or company is not within it, but the section plainly deals with a natural person, and if a company is not hit by this section, all I can say is, that the Legislature in its language has not brought it within the section. If the matter was doubtful—if the construction, so to speak, hung in the balance—you might have regard to the argument founded on this section, but the construction, in my opinion, is obvious, that "person" is confined to natural person and does not extend to corporation or company. In the same context I may say, in reference to the Interpretation Act, that the words "unless it shall appear to the contrary, *person* shall include corporation," leave us exactly where we were, because it is perfectly plain to my mind, taking all the sections of the Act of Parliament together, that "person" means natural person and not artificial person such as a corporation or a company. The contrary meaning not only appears, but most manifestly appears.

Take some of the other sections of the Act of Parliament. All the provisions for putting a person on the register and for taking a person off the register are plainly confined to natural persons. As Mr. Doyle and Mr. Healy pointed out, there is not one section or expression in the Act of Parliament itself extending the meaning to corporations. Take, for instance, the 13th section, which provides: "When a person registered in the dentists' registry has either before or after the passing of this Act, and either before or after he is so registered, been convicted either in Her Majesty's dominions, or elsewhere, of an offence which, if committed in England, would be a *felony* or misdemeanour, or been guilty of any infamous or disgraceful conduct in a professional respect, that person shall be liable to have his name

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erased from the registry." Of course that only applies to a natural person.

Then there is the 18th section, which provides for examination—that is to say, examination of human beings, of natural persons. The final clause of this 18th section provides: "Each of the said colleges or bodies shall admit to the examinations held by them respectively under this section any person desirous of being examined who *has attained the age of twenty-one years.*" That does not apply to a corporation or a company.

Take the 35th section, which provides a penalty for obtaining registration by false representation: "Any person who wilfully procures or attempts to procure himself to be registered under this Act by making or producing, or causing to be made or produced, any false or fraudulent representation, or declaration either verbally or in writing, and any person who aids and assists him therein, shall be deemed guilty of a misdemeanour in England and Ireland, and in Scotland of a crime or offence punishable by fine or imprisonment, and shall on conviction thereof *be liable to be imprisoned* for any term not exceeding twelve months." You cannot imprison a corporation or a company. A corporation or a company is liable to be fined, no doubt, or it can be indicted for a misdemeanour and can be fined, made liable for a penalty, but you cannot put a corporation or a company into prison. Then, again, there is the section which provides exemption from serving in the militia—an exemption applicable only to a natural person. It provides that every person registered shall be exempt "from serving in the militia, and the name of any registered person shall not be returned in any list of persons liable to serve in the militia."

Now, taking the 3rd section alone, I am of opinion, without travelling beyond that section to any other section, that it is plain that the word "person" is confined to natural person. But if we take all the sections of the Act of Parliament, I think it becomes still more plain. Mr. Ronan, in his argument, said that, upon that construction, the object of the statute will be frustrated. But the exclusive method which the Legislature adopted was by enacting that a person who, capable of being registered, is not registered, should not take any title implying that he is a qualified

dentist, and that if he did so, he should be subject to penalties. That provision is not frustrated by holding as we do. We are giving to this statute the wide interpretation that all persons who can register and do not register are liable to be prosecuted, if they take a name implying that they are dentists. There is a wide field to operate upon. However, it must be remembered that before, as well as since, the "Dentists Act" the Legislature has not infrequently failed in its policy and object owing to the inappropriateness and inadequacy of the language it employed. The ingenious have often invented, and I dare say will often invent, devices to "get out" of Acts of Parliament; and though we should construe Acts of Parliament with a view of reaching the mischief sought to be prevented, yet if the Legislature by its language does not enable us to do so, we cannot import the words which are necessary to hit the device and reach the mischief. Our function is to interpret the language of the statute and not to import into it words which would enable us to reach a particular mischief. If the words are not there, we are helpless, and recourse must be had to the Legislature. The necessary words are not in the statute under consideration, because such a thing as the defendant company was not in existence when the Dentists Act was passed, and such a device, if device it be, was not at all within the contemplation of Parliament. In the case of *The Pharmaceutical Society* v. *The London and Provincial Supply Association* (1) Lord Watson says at the end of his judgment:—"It is not for me to speculate as to what was in the mind of the framer of this statute, whether he had forgotten the fact that there were corporations which either were dealing or might deal in poisonous drugs, or whether, having this in view, he framed this Act for the purpose of subjecting them to certain disabilities. I can only look, my Lords, at the language which the Legislature has employed in the enacting sections, sections 1 and 15; and I can only say this, that even if I was satisfied that it had been the intention of the framer of these two sections to give to individuals registered under this Act the exclusive privilege of selling poisonous drugs by retail, and to impose penalties on corporations keeping open shop for that purpose, I must say I come to this conclusion, that it

(1) 5 A. C. 857.

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would have been a very simple thing for the Legislature to have said so in express terms, and I, for my own part, am quite satisfied, apart from those considerations which have led your Lordships to put another construction on the terms of the statute, that the framer of it, if that was his intention, has entirely failed to use language adequate for the purpose he intended to attain."

So here, even supposing it was intended by the framer of this statute to include corporations (a very far-fetched supposition, as no such company as the defendant Company existed at the time when the Act passed), he failed to express his purpose—*quod voluit non dixit.* But, in my judgment, there is no difficulty at all. It is plain that the word "person" means natural person, and cannot be extended to an artificial person such as a corporation or a company.

Therefore, the view of the magistrates must be affirmed.

Gibson, J.:—

The object of the Act of 1878 was not to prohibit unregistered persons from drawing or stuffing teeth, but to provide for the registration of specially qualified persons, and prevent persons not registered from using names or titles expressly or impliedly representing that they were registered. Admittedly, a corporation is not capable of registration. The question before us is, whether a limited company, part of whose registered name is "surgeon dentists," by using that registered name committed an offence within section 3 of the Act.

The Act is prefaced by a preamble using the word "person" in a sense which manifestly excludes corporations. The first paragraph of section 3 clearly refers to natural persons. The person who is not to use the name, title, addition, or description, implying that he is registered or specially qualified, must be a natural person. In the second paragraph, on which this prosecution is founded, "person" must mean the same kind of person. The Interpretation Act, 1889, section 2, which comes under the heading "Re-enactment of existing Rules," cannot retrospectively enlarge the meaning of the term in sect. 3. It is not the function of an interpretation clause to disturb the meaning of plain words: *Reg.* v. *Pearce* (1).

(1) 5 Q. B. D. at p. 389.

The prosecutor's chief argument is that the object of the statute can be evaded and defeated if companies can mislead unwary persons by representing themselves as qualified dentists. But the penal provision in section 3 cannot be stretched to extend to a case not within its actual language. If the Legislature intended to make corporations punishable, it has failed to express that intention in adequate language, as Lord Watson remarked in *The Pharmaceutical Case* (1). The prosecution therefore fails. The Act was never designed to apply to a corporation or to prevent a limited company from using its own proper name in which it was registered. The mischief might have been dealt with if Parliament had foreseen it; but the danger was not foreseen, and the Act only punishes individuals.

MADDEN, J. :—

I agree in the decision of the Court, and if the governing intention of the Legislature in regard to the protection of the public has been frustrated, as I believe it has been, this is a necessary consequence of the language that has been employed. But what has occurred is quite intelligible. The mischief, against which the present prosecution is directed, was not in existence in 1878. If it had been in existence, I have no doubt that an interpretation clause in the ordinary form would have been embodied in the Act; but the Legislature, dealing only with an individual professing to be a dentist, had no occasion to insert such a clause. Years afterwards the mischief came into existence. In this state of affairs it seems to me that our duty is to construe the statute with a view to matters as they existed when it was passed, and to the mischief which was then before the Legislature, so far as they can be discovered from the Act of Parliament. If a different mischief has come into existence at a subsequent date, it is not for us, as a Court of construction, to supply the deficiency of the Legislature. This consideration has the greater weight, because our decision in the present case would be without appeal. The Legislature, if it thinks fit, can pass a statute specially directed against the mischief which has recently come into existence.

(1) 5 A. C. at p. 875.

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For these reasons, without expressing any opinion as to what would be the result of a critical examination of the Act, if the mischief had been in existence at the time when it was passed, I concur in the judgment of the Court.

Solicitors for the complainant: *Bradley & Son.*
Solicitors for the defendant: *Connolly & Co.*

J. L.

K. B. Div. 1903. June 18, 29.

SMYTH AND OTHERS *v.* WILSON (1).

(1900. No. 1195.)

*Practice—Costs—Party and party—Taxation—Right of way—Public and private—General costs—*40 *&* 41 *Vict. c.* 57, *s.* 53.

In an action for damages for the obstruction of a right of way, claimed alternatively as a public and as a private right of way, the jury found in favour of the plaintiffs in respect of the claim founded on the public right of way, judgment being directed for the defendant in respect of the claim founded on the alleged private right of way.

On a motion for review of the taxation of costs:—

Held, that the plaintiffs were entitled to the general costs of the action, and the defendant only to the costs of the issue on which he succeeded.

Kennedy v. *Healy* ([1897] 2 I. R. 258) distinguished.

MOTION ON NOTICE.

Application to review the taxation of the plaintiffs' costs in the action, which was tried before Mr. Justice Barton and a special jury of the county of Antrim on 24th July, 1901. The plaintiffs claimed damages for the obstruction of an alleged right of way over certain lands at Kenbilly, county Antrim, and an injunction; the right of way being claimed in separate paragraphs of the statement of claim as (1) a public, and (2) a private right of way. The learned Judge at the trial directed a verdict and entered judgment, with costs, for the defendant on foot of the claim in respect of the private right of way, and, on the findings of the jury, judgment

(1) Before MADDEN and BOYD, JJ.

was entered for the plaintiff for one shilling damages, and costs, "on foot of the causes of action in the first paragraph of the statement of claim," which dealt solely with the public right of way. The Taxing Master refused to allow the plaintiffs the general costs of the action, and (amongst other items) disallowed one moiety of the costs of the witnesses called by the plaintiffs and one half of the fee to the special jury, and allowed counsels' fees equally to the plaintiffs and defendant.

R. F. Todd, for the plaintiffs:—

The Taxing Master proceeded on a wrong principle. The plaintiffs were entitled to the general costs of the action, and the defendant only to such costs as were applicable exclusively to the issue on which he succeeded. The evidence of the plaintiffs' witnesses was directed solely to the existence of the public right of way, and the plaintiffs are entitled to the costs of such witnesses in full. The plaintiff in *Kennedy* v. *Healy* (1) sued for two causes of action, viz. *trespass to the person*, and *money had and received*. There might not in such an action be two witnesses in common. So also in *Fisher* v. *Rooney* (2) there were two distinct causes of action in respect of libels on different days. In such cases there are two results and two successful parties. It is otherwise where the plaintiff, as here, succeeds in the one substantial cause of action, namely, the assertion of a right of way, the right to which is pleaded in two different ways.

M'Ilroy, for the defendant:—

Under section 53 of the Judicature Act neither party is entitled to the general costs of the action: *Kennedy* v. *Healy* (1). There were here two separate causes of action; the two rights of way claimed are distinct; the private one is not merely an extension of a public one, and if the plaintiffs could have established the former, they would not have had to prove special damage: Goddard on Easements. The pleadings are distinct, and the registrar's certificate stated that judgment was entered for the plaintiff "on foot of the causes of action in the first paragraph of

(1) [1897] 2 I. R. 258. (2) 2 New Ir. Jur. 193.

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the statement of claim." It is submitted therefore that the plaintiffs have succeeded on the one cause of action, and the defendant on the other, and that the principle adopted by the Taxing Master was correct.

June 29.

MADDEN, J.:—

In this case the plaintiffs sued the defendant for obstructing them in the enjoyment of a right of way. The right of way, as is not uncommonly the case, was claimed alternatively as a public and as a private right.

At the trial the Judge directed the jury in favour of the defendant as to the private right of way; and the jury found in favour of the plaintiffs on the claim of a public right. The certificate of the registrar deals separately with each of these findings, and when the matter came before the Taxing Master it was contended on behalf of the defendant that under the provisions of the Judicature Act, according to which costs follow the event, there were two findings, one determined in favour of the plaintiffs, and the other in favour of the defendant. On behalf of the plaintiffs it was contended that in substance and in reality there was but one finding and one event, namely, their success in an action brought against the defendant for obstructing them in the enjoyment of a right of way. The principles applicable to the case have been so clearly laid down by the Court of Appeal in *Kennedy* v. *Healy* (1), that it is only necessary to refer to this authority, and to state the general result in the words of the Lord Chief Baron:—"Where, in a single action, there are two independent causes of action, upon each of which a separate action might have been brought, and there has been a separate result as to each, that single action must, for the purposes of the 53rd section of the Judicature Act, be treated as two independent actions."

The question in each case is, whether there were two separate findings or only one finding decided in favour of one or other of the parties. Mr. M'Ilroy's argument, pressed to its logical conclusion,

(1) [1897] 2 I. R. 258.

from which he did not shrink, would amount to this, that where the right of action is stated in a different manner in different counts, each count, and the finding upon each count, must be treated as a different event. I put to him the following illustration. A plaintiff sues a defendant for the recovery of money lent; the loan is secured by a bill of sale, and by a promissory note, and behind all this is the contract of loan. The bill of sale is unregistered, and the promissory note was not presented, and the plaintiff accordingly fails on the two counts founded on the bill of sale and on the note, but he succeeds on the count for money lent, can it be said that there were three events in such an action? This would be contrary to common sense, because the substance of the action is the recovery of the money lent, just as in the present case the substance of the action is the assertion of a right of way obstructed by the defendant.

We inquired into the case of *Roddy* v. *White* (1), in which a similar result followed. On examining the certificate in that case a difference will be found between it and the certificate in the case before us. *Roddy* v. *White* (1) was tried four times, and at the last trial the result was similar to that in the present case. The plaintiff succeeded as regards the public right of way, and failed, by direction, as regards the alleged private right. The Lord Chief Baron, who tried the case, awarded the general costs of the action to the plaintiff. That is of value as expressing the opinion of the Lord Chief Baron that in such a case the event was one and indivisible, and carried the general costs of the action. No reliance can be placed on the difference of form between the two certificates, for it appears to have been recently decided by the Court of Appeal, in a case mentioned by my brother Boyd, that the form of the certificate in such a case is immaterial, the question for the Court being whether in substance and in reality there is one finding and one event. In our opinion, the plaintiff is entitled to the general costs of this action, the event being one and indivisible, and decided in his favour, the defendant being entitled only to the costs of the issue on which he succeeded, and we refer back the costs to the Taxing Master for re-consideration, having regard to this declaration

(1) Unreported.

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of the Court. The defendant must pay the plaintiffs' costs of the motion.

BOYD, J., concurred.

Solicitors for the plaintiffs: *J. & A. Caruth.*
Solicitor for the defendant: *J. K. Currie.*

R. ST. J. C.

K. B. Div. 1903. Oct. 27, 31.

M'LARNON *v.* CARRICKFERGUS URBAN DISTRICT COUNCIL; AND IN THE MATTER OF 38 & 39 VICT. c. 44 (1).

(1902. No. 5852.)

Solicitor—Charging order—"Property recovered or preserved"—Building contract—Retention money—Assignment of—Priority—38 & 39 Vict. c. 44, s. 3.

The plaintiff recovered judgment against the defendants in an action brought to recover £1040 15*s.* 1*d.* for—(1) extras under a building contract, and (2) 10 per cent. of the contract price retained by the defendants under a term of the contract. Three months prior to the issue of the writ in the action portion of the said retention money coming to the plaintiff was assigned by him for valuable consideration to W. G., the latter being a member of the Urban Council, the defendants. The judgment, entered at the trial for the plaintiff, was subsequently set aside by an order of the King's Bench Division, whereupon the plaintiff appealed to the Court of Appeal; but, pending the appeal, a consent was signed by the parties, under the terms of which the defendants were to pay to the plaintiff portion of the sum claimed, in satisfaction of his full claim under the contract, the plaintiff paying the defendants their taxed costs of the action. Upon an application by the solicitor for the plaintiff in the action for a charging order for his costs under 39 & 40 Vict. c. 44, s. 3:—

Held, (1) that the money payable under the consent was money "recovered or preserved in the action" by the instrumentality of the solicitor for the plaintiff; and (2) that the assignee, having known of and adopted the proceedings, and now seeking payment out of the money so recovered, was not entitled, as a *bona fide* purchaser for value without notice, to payment in priority over the costs of the solicitor for the plaintiff.

(1) Before KENNY, BARTON, and WRIGHT, JJ.

Motion on Notice.

The action was brought by the plaintiff to recover the sum of £1040 15*s.* 1*d.* claimed to be due by the defendants to him, on foot of a contract dated 29th September, 1900, and made between the plaintiff and the defendants for the construction of a system of sewerage for the town of Carrickfergus, which sum included £402 8*s.* 9*d.*, being 10 per cent. of the sum of £4024 7*s.* 5*d.*, paid by the defendants to the plaintiff on foot of *interim* certificates, which 10 per cent. the defendants claimed, on the true construction of the contract, they were entitled to retain for a period of twelve months after their engineer had certified that the work under the contract was completed to his satisfaction, the balance of the claim being on foot of extras.

Portion of the said retention money, amounting to £289, was by an indenture dated 8th February, 1902, assigned by the plaintiff to William Gorman and James Charles Gorman as security for money due to them for materials supplied by them to the plaintiff to enable him to carry out his contract, notice of which assignment was on the 10th February, 1902, served upon the defendants, of which body William Gorman was a member.

The writ was issued on the 8th May, 1902, and the action, which was tried before Mr. Justice Madden and a special jury of the city of Dublin, during the Michaelmas Sittings, 1902, resulted in a verdict and judgment being entered for the plaintiff for the sum of £925.

This judgment was by an order of the King's Bench Division dated 22nd April, 1903, set aside, and judgment entered for the defendants, the Court holding that no certificate of the proper completion of the works had in fact been presented to the defendants, and that a certain informal document relied upon by the plaintiff did not amount to such a certificate. The plaintiff served notice of appeal against this order, but after the appeal was listed for hearing, and before the appeal was heard, a consent dated 17th June, 1903, was entered into by the parties, by which it was agreed that the defendants should pay to the plaintiff the sum of £650 in full discharge of all claims in the action or otherwise arising out of the contract, and that the plaintiff should pay to the defendants their costs of action as between party and party

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when taxed. This consent was subsequently made a rule of Court.

The present application was on behalf of Samuel Ross, solicitor for the plaintiff in the action, for an order declaring that the amount due to him by the plaintiff for the costs of the action, the hearing before the Divisional Court, and the appeal therein, when taxed and ascertained, was well charged upon the sum of £650 recovered in the action, after the payment thereout of the costs of the defendants as between party and party when taxed and ascertained.

Hume, K.C., for the applicant :—

The plaintiff's solicitor is entitled to a charging order under 39 & 40 Vict. c. 44, s. 3. The money was recovered or preserved by his instrumentality. Had the order of the Divisional Court stood, neither M'Larnon nor the Gormans could have got anything, as no certificate of completion has been granted to the present time. The effect of the litigation and of the subsequent compromise was therefore to recover this money for all parties beneficially entitled. That it was the result of a compromise is immaterial : *Radcliff* v. *Swift* (1). In *Jones* v. *Frost* (2), the incumbrance sought to be set aside was entirely valueless, and the action was dismissed with costs, by consent, the incumbrance being reconveyed ; yet the solicitor who had conducted the suit was held entitled to a charging order for his costs on the property the subject-matter of the suit, the incumbrance being a possible cloud on the title.

That M'Larnon may only have been entitled to a share in the money recovered is no ground of objection : *Bulley* v. *Bulley* (3). The property need not belong to the same party who employed the solicitor, the right to a charging order being based on the principle of salvage : *Scholey* v. *Peck* (4). William Gorman was himself a defendant ; he knew of the action, yet stood by. He might have adopted an independent position, and may have a fresh right of action against the defendants himself, but cannot now adopt

(1) 32 S. J. 787.
(2) L. R. 7 Ch. App. 773.
(3) 8 Ch. D. 479.
(4) [1893] 1 Ch. 709.

the proceedings taken by M'Larnon and claim priority for his assignment over the costs of the applicant.

Gordon, K.C., and *M'Ilroy*, for the Gormans :—

(1). It is not enough that the plaintiffs should recover money in the action. If that were so, the section could have so expressed it. But, on the contrary, the matter is left in the control of the Court, which must see that the money has been recovered by the *instrumentality* of the solicitor. This money was not so recovered within the meaning of the section, which implies some meritorious act on the part of the solicitor. The retention money was in the hands of the defendants, who were ready to pay it when the necessary conditions had been fulfilled. The only result of the litigation was to burden the plaintiff with the costs of the defendants ; and if this application be granted, the Gormans, who supplied the materials for the work, will be left with nothing to satisfy the amount due under their assignment.

(2). The Gormans were *bona fide* purchasers for value without notice, the assignment to them having been executed three months prior to the date on which the writ was issued. *Ridd* v. *Thorne* (1) and *Cole* v. *Eley* (2) (following *Faithfull* v. *Ewen* (3)) are therefore distinguishable.

J. H. Pigot, for the defendants.

Hume, K.C., in reply.

Cur. adv. vult.

Oct. 31.

KENNY, J. :—

This is an application by Mr. Samuel Ross, the solicitor for the plaintiff, for a charging order on the sum recovered in the action, which sum he alleges to have been recovered for the plaintiff by reason of his instrumentality as the plaintiff's solicitor.

The plaintiff does not appear on this application. It is opposed on behalf of William Gorman and James C. Gorman, who are mortgagees or assignees of part of the plaintiff's claim. The plaintiff M'Larnon was a contractor, who did work for the defendants, the Urban District Council of Carrickfergus ; and certificates on foot

(1) [1902] 2 Ch. 344. (2) [1894] 2 Q. B. 180. (3) 7 Ch. D. 495.

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Kenny, J.

of the contract were from time to time given by the engineer of the council, portions of the amounts due under which were paid to M'Larnon, the usual 10 per cent. being retained until the completion of the works. When the latter were alleged to have been completed, the 10 per cent. so retained and other sums in respect of extras not having been paid to him, he brought his action for the amount, £1040 15*s.* 1*d.* M'Larnon succeeded in the action, a verdict and judgment being entered for him for the sum of £925. There was a motion for a new trial, the result of which was that the verdict and judgment were set aside upon the ground that a certain letter, which was relied upon by the plaintiff as amounting to a certificate of the completion of the works, could not receive such a construction. The jury, however, had found, as a matter of fact, that the works had been completed. An appeal was taken to the Court of Appeal from the order of the King's Bench Division, and when the matter was about to come on for argument the action was settled on the basis of a consent which was made a rule of Court, and which provided that all the proceedings in the action should be stayed on the terms that the defendants, the Urban District Council, should pay to the plaintiff the sum of £650 in respect of his rights in the action, after deducting thereout the taxed costs incurred by the defendants. These costs have not been taxed, and we do not know what they amount to, but we may assume that they will be fairly heavy, and that no sum approaching £650 will be left for the plaintiff or his solicitor, or his mortgagees, the Gormans. The title of the latter arises in the following manner:—Before the action was instituted, namely, on the 8th February, 1902, M'Larnon assigned to William Gorman and James C. Gorman, who had advanced him money and supplied him with materials for the carrying on of these works, the sum of £289 of the money which would eventually be coming to him on foot of the contract. There was no action pending at that time, and in the sense of not having notice of a thing that did not exist, the Gormans were *bona fide* purchasers for value without notice. When the writ was issued no notice was taken of the Gormans' rights; but there is evidence that William Gorman himself knew of all the proceedings in the action—he being a member of the defendants' council.

The applicant now contends that he is entitled to his charging order in priority to any claim of the Gormans—that the £650 was recovered through his exertions, not alone on behalf of M'Larnon, but of every person having an interest in the balance due on foot of the building contract, and that Gorman falls within the latter category. It is put very properly by Mr. Hume on the ground that the solicitor is a salvagor, inasmuch as he has saved property, which might otherwise be lost to everyone having an interest in it.

Under the Act of Parliament the first question we have to consider is, whether or not this £650 is money recovered in the action through the instrumentality of the applicant.

We are all of opinion that unquestionably it must be so regarded. Although the result of a compromise, it is the fruit of Mr. Ross' exertions and proceedings as solicitor for the plaintiff.

The Gormans might have contended that, being assignees of £289, portion of the sum sued for, they were joint owners with the plaintiff, and if the defendants chose to come to a settlement with M'Larnon, they did so at their own risk, and their rights were untouched. This is not the attitude they have taken up. They have come in here, in the very action in which the money has been recovered, to make a claim to the very thing recovered, and have thereby adopted the proceedings as being proceedings for the benefit of themselves as well as of the plaintiff. If they adopt the proceedings, they can only do so, in my opinion, subject to the rights of the plaintiff's solicitor. Several cases have been cited as to the position of a *bona fide* purchaser for value without notice, when his rights come into conflict with those of the plaintiff's solicitor. The Gormans did occupy the position of *bona fide* purchasers for value, but they knew of this action from the beginning, William Gorman being, as a member of the council, practically a defendant in it.

In *Scholey* v. *Peck* (1) the same contention was raised as in the present case, viz. that the mortgagee was not bound, but Romer, J., in giving judgment, after referring to the 28th section of the Act

(1) [1893] 1 Ch. 709.

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(23 & 24 Vict. c. 127, s. 28), which he says is very general in its terms, proceeds :—" It authorises a charge, not on the mere interest of the plaintiff, but on all property recovered in the action, whether for the plaintiff only, or for him in connection with others. It is not necessary that the property charged should belong to the same person as employed the solicitor; but it must be by reason of the employment that the property is preserved. Here, undoubtedly, the property was preserved by the action brought by these solicitors on behalf of the plaintiff, and but for the proceedings taken by them the mortgagee would have lost her security."

Does it make any difference, as contended for by Mr. Gordon, that this money is the result of a compromise? Suppose the original verdict for £925 had been supported by the Divisional Court, would not the amount in that case be money recovered through the instrumentality of Mr. Ross?

Radcliff v. *Swift* (1) is a direct authority upon this point. Sir James Hannen there said :—"A solicitor's services are as much required and as valuable in a case where the result was brought about by a compromise as where the action was fought out. That was the law, and it would be most mischievous if it was the law to limit the rights of solicitors to cases where litigation was, after contest, brought to a successful end."

On the whole case we are of opinion that this was money recovered by the exertions of the plaintiff's solicitor—that he is entitled to a charging order on it for his costs, and that he takes priority of the Gormans' assignment.

Barton and Wright, JJ., concurred.

Solicitor for the applicant : *S. Ross.*
Solicitor for the Gormans : *H. Blackburne.*
Solicitors for the defendants : *Johns, Bates & Johns.*

R. ST. J. C.

(1) 32 S. J. 787.

THE KING (HORE) *v.* JUSTICES OF WEXFORD (1).

Appeal. 1902. Nov. 27, 28.

Licensing Act—Offences—Publican's license—Forfeiture—Third conviction—Not within the same year—Licensing Act, 1872, *s.* 30—*Licensing Act*, 1874, *s.* 21.

It is not necessary to cause a forfeiture of a license that the three convictions should be made within the same licensing year.

Reg. (*O'Leary*) v. *Justices of the County of Cork* (12 L. R. Ir. 167) approved of.

APPEAL from an order of the King's Bench dated 3rd November, 1902, allowing the cause shown against an application to make absolute a conditional order for *certiorari* and *mandamus* obtained by Patrick Hore to quash an order of certain Wexford magistrates, whereby they refused to hear an application by Patrick Hore to obtain a transfer of a license, and decided that the license had been forfeited.

It appeared that Maria Hore was the owner of certain licensed premises at Custom House Quay, Wexford, since the 6th July, 1898. On the 23rd May, 1900, Maria Hore was convicted of selling intoxicating liquor to a drunken person, and was fined £1 and costs; the conviction was recorded on her license. On the 27th November, 1901, she was convicted of keeping open her licensed premises during closing hours and fined £2 and costs, and the conviction was recorded on the license. On the 11th June, 1902, she was again convicted at Wexford Petty Sessions of having kept open the licensed premises during closing hours on Sunday, the 1st June, 1902, and fined £2 and costs. She was thus convicted of a third recordable offence.

By indenture dated 18th June, 1902, Maria Hore assigned her interest in the premises and the license to Patrick Hore, who had entered into possession.

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L. JJ.

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On the 18th June, 1902, Patrick Hore applied for a transfer of the license pursuant to sect. 1 of 18 & 19 Vict. c. 114, to enable him to carry on the business until he should obtain a transfer at Quarter Sessions, and for the delivery to him of the license which on the 11th June, 1902, the magistrates had directed to be delivered up as forfeited, and which had been since retained by the clerk in accordance with sect. 55 of the Licensing Act of 1872. When this application was made, a preliminary objection was made by the District Inspector of Police, who contended that, under sect. 30 of the Licensing Act of 1872, the conviction of the 11th June, 1902, following the two previous recorded convictions, had the effect of forfeiting the license. The magistrates upheld the objection, and refused to entertain the application, or to adjudicate thereon, and they held that the license had been forfeited, and the premises disqualified by the third conviction.

Accordingly Patrick Hore applied for a *mandamus* to compel the magistrates to hear and determine the application; but the King's Bench Division considered that they were bound by the decision in *O'Leary's Case* (1), and refused the application. From this order Hore appealed.

T. M. Healy, K.C., and *James O'Connor*, for the appellant.

Campbell, S.-G., and *Cecil Atkinson*, for the respondent.

[The following authorities were referred to:—*Reg.* (*O'Leary*) v. *Justices of Cork* (1); *Cross* v. *Watts* (2); *Reg.* (*Egan*) v. *Cathcart* (3); Stone's Justice of the Peace, 497.]

Nov. 28.

LORD ASHBOURNE:—

This case involves the consideration of an important question of licensing law, which, though decided by the Queen's Bench Division nineteen years ago, is now for the first time challenged in the Court of Appeal. The well-known case of *The Queen* (*O'Leary*) v. *Justices of Cork* (1), decided that the three convictions mentioned in section 30 of the Licensing Act, 1872, need not be made within the same year. Is that decision right? The King's Bench Divi-

(1) 12 L. R. Ir. 167. (2) 13 C. B. (N. S.) 239. (3) 4 L. R. Ir. 567, 570.

Appeal.
1902.
THE KING (HORE) v. JUSTICES OF WEXFORD.
Lord Ashbourne, C.

sion held that they were obviously bound by it, and the appellant has brought the case here, boldly contending that *The Queen* (*O'Leary*) v. *Justices of Cork* (1) is wrong, and that for nineteen years it has been misleading the profession.

The words of the 30th section are in themselves quite clear. They provide that "If any licensed person, on whose license two convictions for offences committed by him against that Act have been recorded, is convicted of any offence which is directed by this Act to be recorded on his license," then the license of such licensed person shall be forfeited.

Here the two recorded convictions were before the current year in which the last conviction took place, as was the fact in *O'Leary's Case* (1), and unless that decision was wrong the appeal must fail.

Section 32 of the Act of 1872 provides that a conviction for any offence under the Act shall not after five years from the date of such conviction be receivable in evidence against any person for the purpose of subjecting him to an increased penalty or to any forfeiture. This, in my opinion, directly implies that within that period such conviction might be relied on. This argument was presented by May, C.J., in his judgment in *O'Leary* v. *Justices of Cork* (1). There are several sections before the 30th in the Act of 1872, in which discrimination is made between first, and second, and subsequent offences—some of these being directed to have their convictions recorded. As to some of them, I can see no room for doubt that the offences are not confined to those of the current year.

I have no doubt, on the English authority cited, that in England the reasoning in *O'Leary's Case* (1) would be regarded as conclusive, and that similar decisions are constantly pronounced in that portion of the empire. The 48th section is important in this connection as showing that the previous convictions are to be regarded in the year during the currency of which the third conviction took place, and that a renewal is a continuation of the old license. Although it does not extend to Ireland, it is worthy of note for the purposes of interpretation, and as showing what is the law in England.

(1) 12 L. R. Ir. 167.

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The provisions with respect to the record of the convictions (sect. 55 of Act of 1872), and for inspection of the entries on the register of licenses (see sect. 21 of Act of 1874), also strongly support the view that the convictions are not confined to the actual year current at the time of the last conviction.

I am, therefore, of opinion that the order of the King's Bench Division was right, and that the appeal should be dismissed with costs.

FITZ GIBBON, L.J. :—

I agree. There are two chief causes of difficulty in the interpretation of the Licensing Acts on such points as the present—(1.) The attempt to combine in the same statute—the Act of 1872—legislation for England and Ireland, dealing with the same subject by the same words, when the antecedent legislation, the decisions, the procedure, the practice, and to some extent the subject-matter, differ in the two countries. (2.) The difficulty of distinguishing between the transitory and the permanent elements of what is called a "license"—a term which is ambiguously used to describe sometimes a license in the strict sense, sometimes a certificate, and sometimes any lawful authority to sell intoxicating liquor. A license is permanent in respect of its being in a sense attached to a building, often involving the expenditure of large capital, and also in its continuing from year to year in the hands of the same person, or attached to the same building. But at the same time it is absolutely transitory both in respect of the issue of a new document for each year, and also because the authority to sell comes to an end every twelve months, unless it is renewed; and furthermore, it comes to an end, so far as strict law is concerned, whenever either the licensing document or the licensed premises pass from the person named in the license. In every such case the person succeeding must become the possessor of what is in strict law a new license, though he is, for certain purposes, recognised as the transferee of the old one.

It was impossible in such a matter to use language so precise that differences of opinion could not arise as to its meaning. The

real question which we have to decide is, whether two sections imposing different penalties both apply, in part, to the same subject-matter. When the matter was discussed here before, Holmes, L.J., thought it impossible, and I thought it might be difficult, to apply the words of each section to similar offences committed by the same person, or to escape inconsistency if both were held applicable to the same case.

We have now to decide whether the word "license" in the Act of 1872, section 30, and in the Act of 1874, section 20, is to be limited to the piece of paper which is issued at the beginning, and which comes to an end at the close, of each licensing year. We cannot get rid of the difficulty in that simple way. We find that the Act contains clauses applicable to England as well as Ireland, in which the word "license" cannot be so limited with respect to England, and we cannot give to the same word one meaning in Ireland and another in England, with regard to the same offence. I am satisfied now that the apparent discrepancy, rather than contradiction, which created the difficulty on the former occasion, and which has given rise to the ingenious argument which we have now heard, amounts to no more than a possible overlapping of the penalties in certain cases only, and only to a small extent. It occurs to me that this overlapping, if it occurs at all, can have no worse effect than giving an alternative punishment for the same offence in some instances. But however that may be, it is, in my opinion, clear that the object of the legislation was to impose a peremptory penalty upon any person against whose license—that is, against whose authority to sell intoxicating liquor—three convictions had been recorded. These three convictions were not to be confined within one period of twelve months, giving the offender a fresh start at every annual licensing sessions, but he was to lose his license if he was thrice convicted, that is, if three convictions were recorded against his license for the time being, during his tenure of the same continuous authority to sell, though it was renewed or continued by the issue to him of fresh licenses—*i.e.* of different documents in successive years. I think that *O'Leary's Case* (1) was rightly decided upon this point.

(1) 12 L. R. Ir. 167.

Appeal. 1902.

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Other difficulties may arise; for instance, whether there is a new start when a licensed person already convicted obtains a new license on removal to other premises, or whether previous convictions will stand as "recorded" against the same premises after they have passed into the possession of a previously unconvicted or newly licensed person. It will be time enough to deal with such questions when they arise, especially as the Acts seem to offer room for considerable argument upon some of the penalties imposed.

WALKER, L.J. :—

I also am of opinion that the decision in *O'Leary* v. *Justices of Cork* (1) was right.

The question in the case mainly arises on sections 30, 31, 32, and 33 of the Act of 1872; but those sections are best understood by a careful perusal of the preceding sections of the same Act.

The opening words of section 30 are :—"If any licensed person, on whose license two convictions for offences committed by him against this Act have been recorded, is convicted of any offence which is directed by this Act to be recorded on his license, the following consequences shall ensue." In my opinion those words are not confined to offences during the current year of the license, or indorsements on it during the same period. There are, at least, ten instances mentioned in the preceding sections in which a graduated scale of penalties is provided in the case of a "first offence and the second and any subsequent offence," and in at least five of them, viz. the offences mentioned in sections 5, 13, 14, 16, and 17, the conviction is directed to be recorded on the license of the person convicted. Under the Act of 1872 the recording on the license was obligatory, unless otherwise directed, but this was altered and made discretionary by the 21st and 38th sections of the Act of 1874. The Act of 1872, however, will be best understood by a perusal of it as it passed, including the several sections which did not apply to Ireland, *e.g.* sections 26–48, inclusive.

It is, in the first place, I think, clear that in many sections

(1) 12 L. R. Ir. 167.

offences against the Act, where first, second, and subsequent cases are named, are not confined to offences within the current year. Take the first-mentioned, section 3—Any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquor at any place where he is not authorised by his license to sell the same, is subject to a penalty—for the first offence £50, for the second offence £100, and for the third and any subsequent offence a larger penalty; and the section then provides:—"In addition to any other penalty imposed by this section, any person convicted of a second or any subsequent offence under this section shall, if he be the holder of a license, forfeit such license." I do not see how, either on the language or the reason of the thing, this section can be confined to offences within the year, and the point is involved in the decision in the case of *Re Authers* (1), where there was a first offence on the 28th March, 1888, against the 4 & 5 Wm. 4, c. 85, and a second in the next current year, viz. on 21st November, 1888. It was held that there was no second offence within section 3, because the first was under a different Act, but it was not suggested that the case would not otherwise come within section 3 of the Act of 1872. Take now one of the five cases I have mentioned in which the conviction is directed to be recorded on the license, *e.g.* section 13—"If any licensed person permits drunkenness or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second and any subsequent offence twenty pounds. Any conviction for an offence under this section shall be recorded on the license of the person convicted, unless the convicting Magistrate or Justice shall otherwise direct." Here, also, there is nothing in the language or the reason of the thing to limit the section. The offender has been more than once found guilty while he was the holder of a license. The same observations apply to sections 5, 14, 16, and 17.

The 30th section deals with the consequences in the way of

(1) 22 Q. B. D. 345.

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Walker, L.J.

forfeiture in the case of, according to the heading, "repeated convictions"; and the person dealt with is the "licensed person" mentioned in the preceding sections. He is a person holding a license. Two convictions have been recorded on his license in a previous year of its currency, as appears from the register of licenses kept under section 36, which is before the Justices, and of which also other evidence may be given under section 33, and he now commits a third offence, and there ensue two consequences, forfeiture of the license, and disqualification to hold one for five years; and second, disqualification of the premises for two years, unless the Court, in its discretion, otherwise orders. Here, again, both language and reason meet the case of "repeated convictions," and the 32nd section is only intelligible on the same ground when it excludes as evidence any conviction recorded more than five years before.

The principal argument of the appellant's counsel was founded on the 36th section. It applies only to persons licensed after the 10th August, 1872, and does not apply to the conviction of any person licensed for any premises then, "so long as he is licensed in respect of the same premises," which last words treat the license *de anno in annum* as a continuing thing. The person licensed after August, 1872, is also subject to section 30, but the premises he trades in come under additional penalties. The second and every subsequent conviction recorded on the license of any one such person shall also be recorded in the register of licenses against the premises. This would be so, apparently, without this sub-section, and sub-section 2—"When four convictions (whether of the same or of different licensed persons) have within five years been so recorded against premises, those premises shall, during one year, be disqualified for the purposes of this Act." Thus, four single separate convictions against four separate persons within five years would disqualify the premises. This and sub-section 3 introduce an additional disqualification as against premises in the case of persons licensed after August, 1872. There is some overlapping, but the sections 30 and 31 are, I think, quite capable of being worked together. The 48th section, which must be regarded as a part of the legislation for interpreting the Act for Ireland, provides that a renewal of a license may be made by an indorsement on the

license, or by the issue of a copy of the old license, but, in the latter case, "there shall be indorsed on such copy all convictions made within the previous five years which are indorsed on the old license." This shows two things—(1) that the previous convictions are to be had regard to in the new year, and (2) that for the purposes of the Act the renewal is a continuation of the old one for the *status* of "licensed person," and it fits in with the words in section 31—"so long as he is licensed in respect of the same premises."

The same object appears in the establishment of the register of convictions against licensed persons and premises, and section 55 is important. It says—"With respect to the record of convictions of licensed persons for offences under this Act committed by them as such, the following provisions shall have effect in cases where this Act requires the conviction to be recorded on the license," and the license is to be produced at the hearing, the indorsement is to be made on it, and the clerk is to enter the particulars of the conviction in the register of licenses. The permanent record againt the licensed person, sections 15, 16, and 21 of the Act of 1874, contains ample provisions to secure the same object, and the Acts are to be read together.

I have not gone outside the Act of 1872 and the incorporating Act of 1874, but I think the earlier legislation proceeds on similar lines; for instance, section 16 of the Act 6 & 7 Wm. 4, c. 38, which provides for forfeiture of the license if the person licensed is convicted of three several offences within the space of six months—a period not qualified by reference to the currency of the license.

I, therefore, agree that the decision in *O'Leary* v. *Justices of Cork* (1) was right, and should be acted on.

HOLMES, L.J.:—

The question arising in this appeal is, whether the three convictions mentioned in section 30 of "The Licensing Act, 1872," must take place in the same licensing year. In *The Queen* (*O'Leary*) v. *The Justices of Cork* (1) the contrary was held by two Judges of the Queen's Bench Division; but the matter seems

(1) 12 L. R. Ir. 167.

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to have been disposed of without reference to certain manifest objections to this construction of the section. An appeal could not have been taken in that case; and although I have no doubt that the decision has been acted on by the licensing authorities, the first time it was questioned or even noticed in the Superior Courts was when *The King* (*O'Hara*) v. *The Justices of Wicklow* (1) was heard by us in May of the present year. On that occasion, counsel for the respondent criticised the construction of section 30 adopted in *O'Leary's Case* (2), and asked us to overrule or disregard it. As *O'Hara's Case* (1) was disposed of in favour of the respondent on other grounds, it was not necessary to express a final opinion on this point; but I think we were all impressed by arguments to which at the time I saw no adequate answer. It was certain that a matter of so much importance having been once agitated would arise again at no distant date; and the Court was therefore careful to leave it open for further consideration. This it has received during the hearing of the present appeal, with the result that I am now able to accept without hesitation the former decision. Section 30 of the Act of 1872 contains no limitation in express terms of the period within which the three convictions mentioned therein are to occur. *Prima facie* forfeiture of the license would follow the third conviction, whatever was the date of the first and second, provided they were all within five years, as prescribed by section 32. The provision as to recording the convictions on the license, however, presents a difficulty.

Although the word "license" is sometimes used in the licensing code to signify a continuing authority to sell intoxicating liquors as distinguished from the paper that for the time being is the evidence of such authority, it is manifest that license in this section refers to some specific document which in Ireland can only be the document granted by the officer of Excise. This is the definition of license to be found in section 37 of the Licensing Act (Ireland), 1874—a definition thereby made also applicable to the Act of 1872, in so far as it relates to Ireland. But the Excise license of a publican is only in force for a single year, beginning in October; at the end of that period it ceases to

(1) 2 New Ir. Jur. 216. (2) 12 L. R. Ir. 167.

have any legal existence; and as the publican is not required to preserve it or give it up, it is probably often lost or destroyed. If, then, the section contemplates, as I think it does, two convictions recorded on a document in actual existence at the date of the third, the only way in which effect can be given to this intention is by holding that the three convictions must take place in the year covered by the Excise license. It is to be noticed that what I refer to is not a difficulty in proof. Even without the register of licenses, which is provided for by subsequent sections, the books kept by the clerk of Petty Sessions in pursuance of his statutory duty show all convictions, and whether they are recorded. The argument relied on is an inference drawn from what is intended and conveyed by the section, namely, that when the publican is convicted for the third time, there should be found recorded in an existing document two previous convictions.

Section 31 is called in aid of this construction. It refers only to convictions of persons who, after the passing of the Act, may become licensed; and in such cases it imposes penalties in addition to those prescribed by the preceding section. It is said that its 2nd sub-section contemplates that a publican's license may continue unforfeited even after a third conviction within five years, and that, while section 30 provides for the disqualification for a term of two years of the licensed premises when there have been three convictions, section 31, sub-section 3, provides for a similar disqualification for a term of only one year when there have been four convictions.

It is argued that there would be no inconsistency in the two sections if the first of them was confined to convictions within the same licensing year; while it would be impossible to bring them into harmony if the view taken in *O'Leary's Case* (1) be adopted. I do not underrate the force of these arguments. In fact, when they were presented in *O'Hara's Case* (2) I did not then find the answer which a fuller examination of the statute has revealed.

The Act of 1872 is primarily an English Act, some provisions of which, including sections 30 to 34, are applied, subject to cer-

(1) 12 L. R. Ir. 167. (2) 2 New Ir. Jur. 216.

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tain modifications, to Ireland. Of course, the same section, unless it is otherwise provided, must be given the same construction in both countries; and if there is anything to show that *O'Leary's Case* (1) is good law in England, we ought to hold that it is good law here. Now, there is a section of the Act (the 48th) not extended to Ireland, and not even printed in the Irish text-books, which not only indicates what is the document upon which the convictions are to be recorded in England, but makes provision for this record continuing for five years. Sub-section 1 of section 48 shows that what is meant in England by a license is not the document issued by the Excise authority, but the order of the licensing Justices. Sub-section 2 provides that the renewal thereof, which is to be obtained every year, may be made by indorsement on the original order, or by the issue of a copy of it; but that, in the latter case, there shall be indorsed on such copy all convictions made within the previous five years which are indorsed on the old license.

Here then we have, as far as England is concerned, a key to the construction of section 30. We have, for the purposes of that section, a document not coming to an end in one year, but continued by indorsement, or by the issue of a duplicate setting forth the recorded convictions for five years. Therefore, it would be impossible to argue in England, from section 30 taken by itself, that convictions recorded any time within five years do not come within its contemplation and intention. Such must also be the law in Ireland. The temporary character of the Excise license can only be used as an index to the construction of the enactment; but once it appears that the document actually referred to is to continue in existence, with its records, for at least five years, the inference on which the appellant relies disappears.

No doubt, it may happen in Ireland that the only license forthcoming shows no recorded conviction, or only one; but, as I have already pointed out, there is no difficulty in proving other recorded convictions, and their dates.

There still remains an apparent inconsistency between sections 30 and 31; but an argument founded thereon is only valuable to

(1) 12 L. R. Ir. 167.

help one of two doubtful constructions. If the meaning of sect. 30 is clear, such meaning must be accepted, even although the result may be that full effect cannot be given to what follows. Much of the difficulty in construing statutes arises from their rarely being the product of homogeneous workmanship. The traces of many minds viewing the subject from very different points of view are to be seen in the licensing code. The comparatively mild penalties of section 31 seem to overlap, in some respects, the more drastic provisions of section 30; but there is ample subject-matter to which the former are applicable, and there is no portion of the one actually contradictory of the other.

Having thus stated my principal reason for upholding the judgment of the Divisional Court, I think it unnecessary to refer to arguments founded on other sections of the Act. The case has been discussed exhaustively on both sides; but the cardinal point is the construction to be given to section 30, as to which I now entertain no doubt.

Solicitor for the appellant: *M. J. O'Connor.*
Solicitor for the Crown: *Sir Patrick Coll.*

R. D. M.

K. B. Div.
1903.
Feb. 25, 28.

THE KING (M'ARDLE) *v.* THE CHAIRMAN AND JUSTICES OF CO. LOUTH (1).

Justices—Summary jurisdiction—Conviction—Appeal to Quarter Sessions—Affirmance of order wrongly certified—One conviction on summons charging several offences—Power of King's Bench Division to amend order of Quarter Sessions.

M., a publican, was charged at Petty Sessions on a summons, alleging five distinct offences under the Licensing Acts, on one of which he was convicted and fined, the other four charges being dismissed without prejudice. The order was properly entered in the Petty Sessions book. M. appealed to the Quarter Sessions. The certificate of the order of the Petty Sessions (Form H) recited the several charges, and stated that the defendant was convicted and fined, but contained no statement as to the charge on which he was convicted, or as to the other charges having been dismissed. The order as so certified was affirmed by the Quarter Sessions:—

Held, that the order so affirmed was bad on its face, as not showing on which charge the defendant was convicted; that, even if the King's Bench Division had power to amend the error in the order of Quarter Sessions, the present was not a case for the exercise of such power, and that therefore the order of the Quarter Sessions affirming the conviction must be quashed.

CERTIORARI.

The prosecutor, a licensed publican, was charged at Petty Sessions on a summons alleging five separate offences against the Licensing Acts, viz.: (1), unlawfully selling intoxicating liquor at a time prohibited by law; (2), unlawfully exposing for sale intoxicating liquors at a time prohibited by law; (3), unlawfully opening his licensed premises for sale of intoxicating liquors at a time prohibited by law; (4), unlawfully keeping open his licensed premises for sale of intoxicating liquors at a time prohibited by law; (5), unlawfully allowing intoxicating liquors to be sold on his licensed premises at a time prohibited by law. The charges were heard by the Justices at Petty Sessions, and an order was made and duly entered in the order book and signed by the pre-

(1) Before LORD O'BRIEN, L.C.J., and KENNY, J.

siding Justice dismissing without prejudice charges 1, 2, 3, and 5; and in respect of charge 4 an order was made—"Defendant convicted, and fined in the sum of £5 and 1s. costs, and the conviction to be indorsed on the license, and in default of payment defendant to be imprisoned in Dundalk gaol for seven days unless same be sooner paid." The defendant appealed to the Quarter Sessions. The certificate of the order at Petty Sessions, contained in the form of appeal delivered to the defendant, Form H in the schedule to the Petty Sessions Act, 1851, recited the five charges and stated the order appealed from, "defendant convicted and fined, &c.," but omitted to state that the conviction was in respect of the 4th charge, and that the other charges had been dismissed. The Clerk of the Crown and Peace, on lodgment of the appeal, entered on his book the order of Petty Sessions in the form in which it was certified in Form H. The appeal was heard by the chairman and Justices at Quarter Sessions, and an order was made by them and certified at foot of the form of appeal—"Appeal dismissed, fine to be reduced to £2, and 1s. costs, 10s. costs of appeal."

The prosecutor obtained a conditional order for a writ of *certiorari* to bring up and quash the order of the chairman and Justices dismissing the appeal and confirming the conviction on the grounds that the same was made without, and in excess of, jurisdiction, and was bad on its face as being uncertain and dealing with five distinct charges as one offence; and did not dispose with certainty of each charge, and was undeterminate, and did not specify the offence. The present application was to make the conditional order absolute, notwithstanding cause shown.

M'Loone (with him *Henry, K.C.*), for the prosecutor:—

The order of the magistrates at Petty Sessions as certified in Form H is bad on its face, inasmuch as several alternative charges are dealt with as one offence: *R.* (*Collins*) v. *Justices of Waterford* (1); *Cotterill* v. *Lempriere* (2). It is the order as so certified which was affirmed by the Court of Quarter Sessions. This Court cannot go outside the order of the Quarter Sessions as appearing in Form H, and entered by the Clerk of the Crown and Peace in the Quarter Sessions book. This is the order appearing on the

(1) 27 I. L. T. R. 54. (2) 24 Q. B. D. 634.

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THE KING (M'ARDLE) *v.* JUSTICES OF LOUTH.

record, and the entry in the Petty Sessions book cannot be looked at. There is no power in this Court to amend an order of Quarter Sessions; the power of amendment given by 40 & 41 Vict. c. 56, sect. 76, applies only to amending a summons, charge, or information.

Cecil Atkinson, for the complainant in the Court below:—

The Justices at Quarter Sessions may look at the Petty Sessions book, and are not confined to the certificate of the order given in Form H: *The Queen* v. *Dillon* (1). The appeal given by section 24 of the Petty Sessions Act, 1851, is from an order made by the Justices; that must mean the actual order, and not an incorrect copy of it. The Petty Sessions book was in fact before the Quarter Sessions Court here. It is not necessary that there should be a determination on each charge in the summons: *Ex parte Conybeare* (2). This Court has power to amend the order: *R.* v. *Biggins* (3). At all events there is jurisdiction to amend a mere clerical error such as the misrecital in the present case: 2 Hawk. Pl. Cr. p. 267; 3 Bl. Com. p. 438.

Henry, K.C., in reply:—

R. v. *Biggins* (3) was decided under the 7th sect. of 12 & 13 Vict. c. 45, an Act which does not apply to Ireland. Independently of that section the amendment could not have been made: *R.* v. *Inhabitants of Crowman* (4); *R.* v. *Inhabitants of Hellingley* (5); *per* Lord Cairns, L.C., in *Overseers of the Poor of Walsall* v. *London and North-Western Railway Co.* (6).

Cur. adv. vult.

Feb. 28.

KENNY, J.:—

The applicant for the writ of *certiorari* in this case appeared at Petty Sessions to answer five separate charges preferred against him under the Licensing Acts. On one of these he was convicted and fined £5, with an indorsement on his license. The other charges were dismissed without prejudice. The entries in the Petty Sessions book of the conviction and dismissals are absolutely

(1) Judgments of Superior Courts, Ireland, 181, 183.
(2) *Ib.* 327.
(3) 26 J. P. 437.
(4) 14 Q. B. 221.
(5) 1 E. & E. 749.
(6) 4 A. C. 30, at p. 40.

correct. The applicant appealed, and, in accordance with the Act of Parliament, received Form H. from the clerk of Petty Sessions for the purposes of the appeal. That form purported to contain a certificate of the order at Petty Sessions. The certificate so given deviated from the findings in the Petty Sessions book by omitting altogether the dismissals of the four charges, and by, in effect, representing that there had been a single conviction on all the charges. It is admitted that if the real order was in that form it would be bad. On the lodgment of the appeal with the Clerk of the Crown and Peace he entered on his book the order of Petty Sessions in the form in which it was thus certified in Form H. He had no alternative, for the order as certified is made evidence by the Act, and it is from it the Clerk of the Crown and Peace is to make up his record. The chairman and Justices at Quarter Sessions having re-heard the case, affirmed the conviction, but reduced the penalty to £2 ; but that affirmance, it is important to remember, is of the Petty Sessions order as the latter was stated in the certificate, and as it appeared on the face of the Clerk of the Peace's book—and not the real order as it was made by the Justices at Petty Sessions and recorded in *their* book.

The applicant now seeks to have the order of Quarter Sessions quashed. He does not quarrel, on this application, with the magistrates' order at Petty Sessions, which, if we accede to his application, will remain untouched, but which will be still subject to appeal after continuances have been entered.

Without an amendment the order of Quarter Sessions cannot, in our opinion, stand. Indeed that is practically admitted. Have we then power to amend that order so far as to bring what may be called the "recital" contained in it of the Petty Sessions order into accord with the real order as pronounced and entered up, and if we have, should we exercise it? It is a record of a Court of Record we are asked to amend, and the only express power of amendment to which we have been referred is that given by the County Courts Act of 1877, but that power does not extend to the order at Quarter Sessions. But it is contended that we have an inherent power to amend the record when it is plain that only a slip or clerical error has taken place. I am not at all satisfied as to our powers in this respect, but I am clearly of opinion that, even if

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Kenny, J.

we have such a power, we could not regard the erroneous recital as a slip or clerical error; and furthermore, that the present case is not one in which the power should be exercised. Although the affidavits do not disclose the fact, it is alleged—and for the purpose of his argument, Mr. Henry, for the applicant, accepted the statement—that the magistrates' book was actually in Court at the Quarter Sessions, and that the Court was in a position to see what the real order was. But if that be so, why did they not amend the erroneous statement of it as same appeared in the Clerk of the Crown's book? We cannot say what was in the mind of the Court, or whether their attention was ever called to the error. Whether it was or was not, I think we must assume that they dealt with the order of Petty Sessions as in the form appearing in the certificate and in their book, and that it was an order in *that* form, and none other, that they affirmed. Under these circumstances the case is not one, in our opinion, for the exercise of a power of amendment, even if we possessed it, and we must make absolute the conditional order to quash the order of Quarter Sessions.

LORD O'BRIEN, L.C.J.:—

I conferred with my brother Kenny as to the judgment he has just delivered, and agree with it. I have never known, as I said at an early stage of the argument, this Court to amend an *order* of the Court of Quarter Sessions. The only express power of amendment is that given by the 76th section of the County Officers and Courts (Ireland) Act, 1877, and that extends only to an amendment of a summons, charge, or information. I say nothing definitely as to our power to deal with a mere trivial or clerical error apparent upon the face of the order of Quarter Sessions. One would say that where, upon consideration of the whole order, the substance of what is meant is reasonably plain, mere forms of expression not quite consistent with the general effect of the order should not be allowed to prevail. I abstain from saying anything as to the power (if any) of the Court of Quarter Sessions to amend its own order.

Solicitor for the prosecutor: *Robert Dickie.*

Solicitor for the complainant below: *Sir P. Coll.*

J. G. T.

M'CREERY *v.* BENNETT (1).

(1902. No. 9504.)

K. B. Div.
1903.
Oct. 29.

Practice—Equitable execution—Receiver—Clerk of Petty Sessions—Salary of —Assignment—Public policy.

A Petty Sessions clerk covenanted to assign his official salary to plaintiff to secure an annuity. The plaintiff, having recovered judgment for arrears of the annuity, obtained an order for the appointment of a receiver by way of equitable execution over the future salary of the Petty Sessions clerk :—

Held, that the order for the appointment of a receiver by way of equitable execution ought to be discharged.

Per Kenny, J., a clerk of Petty Sessions is a public and judicial officer, and the assignment of his salary would be contrary to public policy and unenforceable.

Motion on Notice.

By an agreement dated 20th August, 1889, and executed by one G. W. Bennett and the defendant of the one part, and the plaintiff and J. M'Creery, her husband, of the other part, the said G. W. Bennett and the defendant, in consideration of the plaintiff and her husband refraining from taking legal proceedings to enforce payment of certain trust funds recited to have been misappropriated by the said G. W. Bennett, jointly and severally covenanted with the plaintiff and her husband to pay to them, and the survivor of them, an annuity of £40 per annum. The agreement provided that for the better securing payment of the said annuity G. W. Bennett charged his salary as sessions clerk at Hospital, county Limerick, and other places, with the payment thereof, and further provided that if, during the life of the plaintiff and her husband or the survivor of them, the said G. W. Bennett should die or resign or be deprived of his position as sessions clerk, and the defendant should be appointed to that position in the place of the said G. W. Bennett, the defendant should immediately thereupon assign and charge to and in favour

(1) Before Kenny, Barton, and Wright, JJ.

K. B. Div. 1903.

M'Creery v. Bennett.

of the plaintiff and her husband, or the survivor of them, the salary to which he would be entitled as such sessions clerk to secure the payment of the said annuity, and should appoint the plaintiff or her husband his lawful attorney, to receive such salary as and when the same should become due and payable.

G. W. Bennett died on the 14th June, 1900, whereupon the defendant succeeded him as clerk of the Petty Sessions district of Kilfinan, at a salary of £80. No assignment of his salary was executed by the defendant in pursuance of the agreement.

In the month of July, 1901, the plaintiff recovered judgment against the defendant for the sum of £35, arrears of the annuity due under the covenant in the said agreement, and by an order in the action dated 31st July, 1901, reciting the deed of 1889, the plaintiff was appointed receiver by way of equitable execution over the beneficial interest of the salary of the defendant as Petty Sessions clerk of the district of Kilfinan.

The defendant paid off the amount of this judgment.

The present action was brought by the plaintiff on the 23rd July, 1902, to recover further arrears of the said annuity, judgment being entered for the plaintiff by consent for the sum of £60, together with the taxed costs of action, and by an order in the action dated 26th August, 1903, which followed in its terms the order dated 31st July, 1901, the plaintiff was again appointed receiver by way of equitable execution over the defendant's salary, which order the defendant now sought to have discharged.

T. J. Smyth, for the defendant :—

The order should be discharged. The defendant is not estopped by having complied with the former order, which was made in a different action. *Holmes* v. *Millage* (1) decides that a receiver cannot be appointed over the future earnings of a judgment creditor. A receiver may be appointed over an instalment of a salary actually accrued due: *Picton* v. *Cullen* (2), but under this order future earnings are attached. The plaintiff cannot rely on the equitable assignment, inasmuch as the defendant, being a public officer, could not prospectively assign his income. No Court of Equity would enforce that assignment. In *Re Mirams* (3)

(1) [1893] 1 Q. B. 551. (2) [1900] 2 I. R. 612. (3) [1891] 1 Q. B. 594.

was decided on the ground that the debtor was not a public officer.

[He also cited *Palmer* v. *Bate* (1); *Cooper* v. *Reilly* (2); and *Parsons* v. *Thompson* (3). He was stopped by the Court.]

Morgan Byrne, for the plaintiff:—

It is submitted that the defendant is estopped from disputing this order by having submitted to that of the 31st July, 1901.

Having regard to the decision in *Holmes* v. *Millage* (4), the Court would not *in invitum* charge, on foot of a judgment alone, the future earnings of a debtor, but where the debtor has himself agreed to charge them, wholly different considerations apply. Lindley, L.J., in *Holmes* v. *Millage* (4), at p. 555, says:—"The judgment creditor here has a legal right to be paid his debt, but not out of the future earnings of his debtor . . . unless he had himself assigned or charged them." There was here a good consideration for the assignment, which is valid under the Judicature Act.

A Petty Sessions clerk is not a public or judicial officer; he is appointed by the magistrates, and is merely their servant. In *Willcock* v. *Terrell* (5) the salary of a retired County Court Judge was held liable to seizure under a writ of sequestration; and in *Manning* v. *Mullins* (6) it was decided that the Court has power to appoint a receiver over the pension of a retired officer of the Royal Irish Constabulary.

Brenan v. *Morrissey* (7) decided that the pension of a retired town clerk is not assignable or chargeable with debts, but it required a special section, viz. section 7 of 32 & 33 Vict. c. 79, to except such an assignment or charge. See also *Hamilton* v. *Coningham* (8), where a committal order for default in payment of an instalment of a judgment debt ordered to be paid by the judgment debtor in instalments was granted against an officer in the army.

Smyth replied.

(1) 2 Brod. & Bing. 673.
(2) 2 Sim. 560.
(3) 1 H. Bl. 322.
(4) [1893] 1 Q. B. 551.
(5) 3 Ex. D. 323.
(6) [1898] 2 I. R. 34.
(7) 26 L. R. Ir. 618.
(8) [1903] 2 I. R. 564.

K. B. Div. 1903.

M'CREERY *v.* BENNETT.

KENNY, J. :—

This is an application on behalf of the defendant to discharge an order of Wright, J., made on the 26th August, 1903, appointing the plaintiff Diana Catherine Spaight M'Creery receiver by way of equitable execution over the beneficial interest of the salary of the defendant as Petty Sessions clerk of the district of Kilfinan, in the county of Limerick. That order follows in its terms a previous order of Boyd, J., dated 31st July, 1901, made in another suit between the same parties, in which judgment was recovered on foot of the same liability of the defendant, namely, a covenant in a deed of assignment, dated 20th August, 1889. The latter order contained a recital which also appears in the order of Wright, J., that the salary had been assigned to the plaintiff and one John M'Creery, and, after it had been made, the defendant paid the amount of that judgment.

Encouraged by her previous success, the plaintiff applied in the present action, which is one in which judgment for £78 17*s.* 9*d.* has been recovered on foot of another gale of the annuity, for an order similar to that of Boyd, J., and obtained it. The order depends for its efficacy, not only on the judgment in the action, but on the assignment which is recited in the order.

There can be no doubt that the plaintiff would be entitled to an order appointing her receiver by way of equitable execution over a gale of the defendant's salary actually accrued due at the date of the application. But can a future gale of the salary be attached either under an assignment or a judgment? A Petty Sessions clerk is appointed jointly by the magistrates and by the Lord Lieutenant, and his continuance in office depends on their action. On his retirement he receives a pension which may be measured or suggested by the magistrates, but which must be approved of by the Lord Lieutenant. It cannot be said that he is paid solely out of local funds. He is paid partly out of the proceeds of fines at Petty Sessions. His position is an important one. It is that of a public and judicial officer (see judgment of Gibson, J., in *Hamilton* v. *Coningham* (1), which I adopt). He is not, as is contended, a mere servant to the magistrates; he is their clerk—records their rulings—is to a large extent answerable for the accuracy of the latter—and his is the hand that issues

(1) [1903] 2 I. R. 564.

official copies of the Justices' orders. If he be an efficient clerk his weight and influence will be felt in the guidance both in law and practice which he can afford to his Bench. The duties of the magistrates are public and judicial. It seems to me that the position of their clerk is a public one—that he is a judicial officer, and that it would be contrary to public policy to allow him to charge or assign the future gales of the salary receivable by him as such officer, and which is granted to him for his services and proper maintenance in that position. If he could not do so by voluntary act, then the assignment in this case must be disregarded. But if the rule founded on public policy forbids an assignment, the plaintiff cannot, in my opinion, be in a better position by reason of her judgment.

The order must be discharged, but without costs.

BARTON, J. :—

I am also of opinion that this order for the appointment of a receiver by way of equitable execution ought to be discharged. In the view which I take of the case I do not find it necessary to express any opinion upon the question of the enforceability of the assignment of 1889, upon the question of public policy, or upon the nature of the office of Petty Sessions clerk. In my opinion we have no jurisdiction to make such an order as this in respect of future salary or earnings. Our want of jurisdiction does not rest upon any consideration of public policy, but upon the general principles applicable to the appointment of receivers by way of equitable execution.

The principles applicable to the appointment of receivers by way of equitable execution are those which were applicable in the Court of Chancery before the Judicature Act. There was no jurisdiction in the Court of Chancery before the Judicature Act to prospectively impound the future earnings of a judgment debtor, and it follows that we have no jurisdiction to prospectively impound them by the appointment of a receiver by way of equitable execution. The reasons for this rule have nothing to do with public policy or with the circumstances of any particular case. They are explained by Lindley, L.J., in *Holmes* v. *Millage* (1), and are referred to by Gibson, J., in *In re Johnson* (2).

(1) [1893] 1 Q. B. 551. (4) [1898] 1 I. R. 551.

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The rule applies generally. It makes no difference whether the judgment debtor is a public officer or a person earning salary in a private employment. Future earnings or salary could not have been reached by a writ of sequestration before the Judicature Act in the Court of Chancery, and cannot be reached by the appointment of a receiver by way of equitable execution in any division of the High Court under our present practice.

Salary which has already become due and pensions for past services stand on an altogether different footing from future salary. They could, as a general rule, have been reached by a writ of sequestration before the Judicature Act, and they can, as a general rule, be reached now by the appointment of a receiver by way of equitable execution. *Picton* v. *Cullen* (1) is an example of a case of salary already earned. *Willcock* v. *Terrell* (2), the case of the retired County Court Judge in England, and *Manning* v. *Mullins* (3), the case of the retired police officer in Ireland, are examples of cases of pension for past services.

It appears to me that we are hardly concerned, upon the present motion, with the question of the legality of the deed of 1889, or with any question of public policy, or with the nature and character of the office of Petty Sessions clerk. These points might be very material at the trial of an action to enforce the covenants in the deed of 1889. This, however, is an application on the part of a judgment creditor for a particular form of execution against a judgment debtor, the right to which mainly depends upon the principles applicable to the particular form of execution of which the judgment creditor seeks to avail himself.

The judgment creditor is not without his remedy. He can apply for an instalment order under the Debtors Act, as was done in *Hamilton* v. *Coningham* (4). But, for the reasons which I have given, the order for the appointment of a receiver by way of equitable execution must, in my opinion, be discharged.

Wright, J., concurred.

Solicitor for the plaintiff: *R. G. Warren.*
Solicitor for the defendant: *J. Binchy.*

R. ST. J. C.

(1) [1900] 2 I. R. 612.
(2) 3 Ex. D. 323.
(3) [1898] 2 I. R. 34.
(4) [1903] 2 I. R. 564.

THE KING (JOHN FINDLATER) *v.* THE RECORDER AND JUSTICES OF THE COUNTY OF DUBLIN (1).

K. B. Div. 1903. June 16, 17, 18, 25.

Licensing Acts—Grounds of objection—General discretion—Justice—Bias—Membership of temperance association—Engaging a solicitor to oppose—Court—Licensing meeting—Licensing (Ireland) Act, 1902 (2 *Edw.* 7, *c.* 18).

Where Justices, at Licensing Sessions, refuse an application for a new license, made under section 6 of the Licensing (Ireland) Act, 1902, viz. in respect of premises attached to or adjoining premises licensed for the sale of intoxicating liquors at the date of the passing of the Act, they are exercising a general discretion upon the application, and they are not bound to set out upon the face of their order a "reason or ground for such prohibition," within the meaning of section 4 of the Licensing (Ireland) Act, 1833.

An application by F. for a publican's license was refused by the Quarter Sessions for the county of Dublin. Three of the Justices composing the Quarter Sessions were subscribers to the funds of the Irish Association for the Prevention of Intemperance, whose objects were to secure a diminution in the number of licensed houses, and to organize strong opposition to licensing applications, and whose solicitor actually attended the Sessions and opposed, in the names of local objectors, the granting of licensing applications, the application of F. amongst the number. A fourth Justice was member of a firm which had subscribed to the funds of the Association, and two others, A and B, were members of the executive committee of the Association, which, before each Licensing Sessions, decided upon the licensing applications to be opposed, and, in the case of F.'s application, directed that the solicitor of the Association should oppose. A was not proved to have been a party to this decision. B was present, but exerted his influence in favour of allowing F.'s application to pass without opposition; his determination to vote for a refusal of the application was arrived at during the hearing at the Sessions. It was the practice of the executive committee, before each Licensing Sessions, to send circulars to over one hundred magistrates, apprising them of the dates with a view to insuring their attendance:—

Held, that no disqualification attached to any of the Justices from taking part in the determination of F.'s application.

Held, also (Barton, J., *diss.*), that a Justice, in opposing, or retaining a solicitor to oppose, a licensing application, is not thereby disqualified from hearing and determining the application as a member of the licensing authority.

Per Barton, J.: Mere membership of the executive committee is not *per se* sufficient to constitute "real and substantial bias"; but if it could be shown that a Justice hearing a licensing application had personally taken part in

(1) Before PALLES, C.B., and JOHNSON, BARTON, and WRIGHT, JJ.

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employing a solicitor to oppose it, "real and substantial bias" would be proved, and the Justice would be disqualified.

Held, also, that, although the licensing authority in Ireland is a "Court," the English decisions dealing with bias on the part of Justices at "licensing meetings" are applicable to Justices composing the licensing authority in Ireland.

MOTION to make absolute conditional orders of *certiorari* and mandamus.

The prosecutor John Findlater was an applicant at the Kilmainham Quarter Sessions, held on the 31st March, 1903, for a new license by way of extension for No. 84, in conjunction with No. 85, Lower George's-street, Kingstown. There was much conflict of evidence in the affidavits as to what took place at the Quarter Sessions. Mr. Gerald Byrne, solicitor, who appeared in support of the application at the Sessions, stated that prior to the calling of the list of licensing applications he drew the attention of the Recorder to the fact that several of the magistrates then assembled were members of a society called the Irish Association for the Prevention of Intemperance, which Society had for its object the diminution in number of licensed houses, and that this Association paid out of its funds counsel and solicitors to appear at the Licensing Sessions then about to commence, and to oppose all applications for new licenses, and he objected to these magistrates taking any part in the adjudication upon the several licensing cases about to be called. The magistrates referred to were W. F. Barrett, F.R.S., Charles Eason, Henry J. Allen, Charles E. Jacob, William Wallace, of the firm of Wallace Bros., and R. W. Booth. Professor Barrett and Mr. Henry J. Allen were also members of the executive committee of the Association, the latter filling the office of its honorary secretary. Professor Barrett, it was stated, took a very active part in opposition to the several applications made at the Sessions, and Mr. Allen took a very active part in the working of the Association. The secretary of the Association had sent circulars to each of the magistrates who subscribed to the Association, informing them of the applications for hearing, and requesting their attendance on the Bench.

Notwithstanding Mr. Byrne's objection, the magistrates referred to took part in the discussion and adjudication, and all the applications listed that day were refused. The application of the pro-

secutor was opposed by Mr. Henry J. M'Cormick, solicitor for the Association for the Prevention of Intemperance, who purported to act on behalf of the Rev. Caleb S. Laird and the Rev. T. Guy Rogers, two parishioners. It was alleged that these two parishioners allowed their names to be used for the sake of form only, and did not in any way employ Mr. M'Cormick as their solicitor, and that he acted on the retainer of, and for payment by, the Society alone. The prosecutor charged that the Bench of magistrates so constituted at the Licensing Quarter Sessions were a biassed and not an impartial Bench, and that the influence of the above-mentioned magistrates upon others, who were not members of the Association, was calculated not to, and did not, give the applicant a fair and impartial hearing.

John B. Moriarty, the secretary of the Association, made an affidavit, in which he stated that it was founded about twenty-five years ago as the Irish Sunday Closing Association, and took an active part in the expression of public opinion, which culminated in the enactment of the Irish Sunday Closing Act. It had since directed its attention to seeing that that Act was efficiently enforced, and to preventing an undue increase in the number of licenses in Ireland, particularly in the city and county of Dublin, and to other general temperance objects. The affidavit proceeded as follows:—With a view to acting in concert with the other temperance societies of Ireland, the general council of the Association met three times a year, and consisted of delegates from the various affiliated societies. The functions of the general council were merely to make suggestions and offer advice to the executive committee of the Association, and beyond these functions it had no advice in, or control over, the funds of the Association or their application, such control resting exclusively with the executive committee. The executive committee of the Association did not oppose all licensing applications. As a matter of fact, it interfered in only a minority of the licensing applications for the city and county of Dublin, viz. where there was a *bona fide* objection to any licensing application on any of the statutory grounds applicable to the case, and a *bona fide* objector, who was prepared to bring these facts before the licensing authority in the interest of the public. It directed its solicitor, and occasionally retained counsel,

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to act for, and in the name of, such objector in bringing the facts and law applicable to such case before the licensing authority. The meeting of the executive committee held next before each Licensing Sessions generally decided whether any, and if so what, applications thereat should be opposed, and such questions were determined by the majority of the members of the executive committee then present. Subscription to the Association, or membership of the executive committee, in no way bound such subscribers or members to any individual action, or even to any particular opinion on any particular case.'

Of the magistrates mentioned, William Wallace was not a subscriber to the Association, but merely a member of a limited company which had subscribed to its funds; Charles Eason, Charles E. Jacob, and Richard W. Booth had subscribed to its funds, but were not members of the executive committee, and had no control whatever over the action of the Association or the application of its funds; Henry J. Allen and William F. Barrett were members of the executive committee. Before the Sessions, the objectors, Rev. Caleb S. Laird and Rev. T. Guy Rogers, communicated with Mr. Moriarty, with a view to making opposition to the application of John Findlater for an extension of his license, and accordingly the solicitor of the Association was instructed to oppose the application, and the two objectors were in Court, ready to be examined, if necessary.

At the Sessions held on the 31st March, 1903, before the list of licensing applications was entered upon, Mr. H. J. M'Cormick, solicitor to the Association, who was acting for some objectors, with the Recorder's permission, read the 60th section of the Licensing Act, 1872. The Recorder then made some observations about the necessity for challenging the composition of the Bench by reading this section, and when he had concluded, Mr. Gerald Byrne, solicitor, said that he objected to magistrates who were subscribers to the Temperance Association taking any part in the proceedings, but he did not mention the name of any magistrate, his objection being of a general character, and it was made in a jocose manner. Shortly after this Mr. Findlater's case was called on. It appeared from the evidence of the applicant that the business he carried on on his premises was a high-class

grocery business, and that no intoxicating liquor was regularly sold for consumption on the premises, but that occasionally it was so sold to a few select customers to prevent the license from becoming dormant. Upon cross-examination by counsel for one of the neighbouring publicans, who was an objector, applicant refused to give any undertaking to carry on his business under the extended license, if granted, upon the same or similar lines. Upon this evidence the Recorder, without consulting the magistrates present, or taking a vote, ruled that the application did not come within the 6th section of the Act of 1902, and the application was accordingly refused.

It was not until after the application of a certain Thomas Murray had been refused at the conclusion of the opposed cases that any particular magistrate on the Bench was objected to. It was the practice a short time before each Sessions to send circulars to over one hundred of the magistrates who usually attended the Sessions. Not one-tenth of these magistrates were subscribers to the Association, or in any way connected with it. It was further stated that in the course of the proceedings at the Licensing Sessions the prosecutor had proposed, as a consideration for the granting of his application, to pay a sum of £500 to a fund for the extinction of another license.

All the Justices objected to made affidavits disavowing bias in relation to the applications before them on the occasion, and corroborating the account given by Mr. Moriarty as to the circumstances under which Mr. Byrne came to make his objection. Professor Barrett stated in addition: —"I am one of the executive committee of the Irish Association for the Prevention of Intemperance, but I submit that such fact does not disqualify me from acting in the ordinary way at Sessions. Such members of the Association as are magistrates are not in any way bound, or even expected, to act in opposition to licensing applications generally, or to act in their judicial capacity according to the views or suggestions of the Association, or otherwise than in accordance with their conscientious view of the law and the facts of each particular case. For my own part, I always endeavour to so act in every case, free from bias or prejudice, and my connection with the said Association does not, I submit, unfit me for so acting. As a matter

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of fact, as regards the application of Mr. Findlater, the prosecutor, so far was I from being prejudiced or biassed against it, that on the contrary I used my influence in favour of it on the executive council of the said Association, and was personally prepared to grant it, until it had become evident, on the admission of the prosecutor himself, that there was much more in the application than a mere *bona fide* desire to render his existing premises more suitable for the business therein carried on by him. I took no active part whatever in the decision of the matter, nor did I directly, or indirectly, influence any person against the application. I favoured the application so long as I understood that the object was merely to extend the ordinary high-class licensed grocery business of Mr. Findlater, and that Mr. Findlater in return was about to contribute liberally to extinguish an ordinary public-house a few doors away in the street, but the attitude taken up by Mr. Findlater and the indications of his demands and intentions completely changed my views as to the application, and caused me to concur in the view taken by the learned Recorder, that there was no evidence on which it could be held that the application was only intended to make the premises more suitable for the sort of business hitherto carried on there."

Mr. Gerald Byrne repudiated the statement that he had made his objection in a jocose or jocular manner; his objection was made in all seriousness, and with the deliberate and considered intention of testing the right of magistrates who were officers of, members of, and subscribers to, the Irish Association for the Prevention of Intemperance, to deal with licensing applications.

The conditional order set out the following grounds as to the *certiorari* :—"That said order is bad on its face, as not setting out the grounds of said refusal; that a number of the Justices who refused the said application were biassed against the same, occasioned by their being subscribing members, and members of the executive committee, and officers of the Irish Association for the Prevention of Intemperance, which said Association was represented by a solicitor at the hearing of the said application, who objected to the granting of the same, by reason of which several matters the Court was not properly constituted."

Ignatius J. O'Brien, *K.C.*, *Blood*, *K.C.*, and *M'Auley*, for the prosecutor.

O'Shaughnessy, *K.C.*, and *A. M. Sullivan*, for Henry J. Allen.

Henry, *K.C.*, and *M. J. Dunn*, for the objectors.

Wylie, *K.C.*, and *James Henry*, for Charles Eason, Charles C. Jacob, Richard W. Booth, and William Wallace.

Serjeant Dodd, and *Fitzhenry*, for Professor Barrett.

Wakely, *K.C.*, and *Cecil Atkinson*, for the police authorities.

The arguments sufficiently appear from the judgments. The following authorities were referred to:—*Rex* v. *Howard* (1); *Boulter* v. *The Justices of Kent* (2); *Reg.* v. *Allen* (3); *Leeson* v. *General Council of Medical Education and Registration* (4); *Allinson* v. *General Council of Medical Education and Registration* (5); *The Queen* v. *Frazer* (6); *The Queen* (*Ellis*) v. *The Justices of the County of Dublin* (7); *The Queen* v. *Huggins* (8); *Reg.* v. *Taylor* (9); *The Queen* (*Dempsey*) v. *Justices of Antrim* (10); *Reg.* v. *Deal* (11); Stone's Justices' Manual, pp. 734-9.

PALLES, C. B.:—

June 29.

This is a motion for a *certiorari* to bring up a refusal, by the Recorder and Justices of the county of Dublin, of an application by the prosecutor for a publican's license, under section 6 of the Act of 1902, and for a mandamus to compel them to rehear the application.

Two grounds are alleged for the application:—(1) that the order is bad on its face, as it does not state the grounds of refusal, and (2) that some of the Justices were biassed.

(1) [1902] 2 K. B. 363.
(2) [1897] A. C. 556.
(3) 4 B. & S. 915.
(4) 43 Ch. D. 366.
(5) [1894] 1 Q. B. 750.
(6) 9 T. L. R. 613.
(7) [1894] 2 I. R. 527.
(8) [1895] 1 Q. B. 563.
(9) 14 T. L. R. 185.
(10) 9 I. L. T. R. 156.
(11) 45 L. T. (N. S.) 441.

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The first ground was but faintly argued, and may be disposed of in a sentence. No doubt, prior to the Act of last session (2 Edw. 7, c. 18), when the procedure before Justices upon such an application was regulated by the Licensing Act of 1833, which limited their jurisdiction to adjudicating upon objections based on specified grounds, the Justices, under the express words of section 4 of that Act (3 & 4 Wm. 4, c. 38), were bound, when they by order prohibited a license, to "therein declare the reason or ground of such prohibition." Their function, under that section, was to adjudicate, not upon the application generally, but upon "the truth, sufficiency, and validity of" the objections, and the reason or ground to be declared in the order was to be that stated in the objection allowed by the Justices. The effect, however, of the Act of 1902, in a case such as the present (which is not within any of the exceptions in section 2), is to suspend, so long as it continues in force, the jurisdiction conferred by the Act of William. The 2nd section of the later Act enacts that no license shall be granted, except for premises of the classes enumerated therein, classes which do not comprise the premises in respect of which the present license is sought. Then the 6th section alters and qualifies the jurisdiction conferred by the Act of William, and (subject to a proviso unnecessary to be stated) enacts that—"Nothing in this Act shall operate to prevent the granting of new licenses, *where the licensing authority thinks fit*, to premises attached to or adjoining premises licensed for the sale of intoxicating liquors at the date of the passing of this Act." As regards this excepted class of premises, within which the prosecutor insists that those in question come, the licensing authority is to do something more than adjudicate upon the "truth, sufficiency, and validity of the objections, if any." It is not to grant the license, unless it "thinks fit." That is, the Act confers on the Justices, in reference to this excepted class of premises, a general discretion, which they had not under the Act of 1833, of refusing a license, although no objection has been taken to it, upon the ground that they do not think fit to grant it. A refusal under this general discretion cannot, in my opinion, be deemed a "reason or ground for such prohibition," within the meaning of section 4 of the Act of 1833, which, as such, ought to be declared in the order.

The second ground of the application is that of bias in the Justices. Before discussing this, which is the substantial ground of the application, it is right to refer to some preliminary objections which have been raised by the Justices to our at all entering upon the discussion of this question.

It is said that it is not open to the prosecutor to raise this question of bias, as he has no title to apply either for a mandamus or a *certiorari*. First, because it is said that it appeared from his own evidence, on the hearing of the application, that the new license was not sought in order to render his former "licensed premises more suitable for the business carried on therein," and that, therefore, the application was excluded from the 6th section by its concluding proviso. Secondly, because it is said that his solicitor did not with sufficient distinctness object to the impeached Justices adjudicating upon the application. Thirdly, because, on the hearing of the application, he offered that, in the event of the license being granted, he would provide a sum of money towards the extinction of another license, an offer which, if accepted and made a condition for granting the license, would have rendered the license void; and, fourthly, because it is said that the application was refused, not by the general Bench of magistrates, but by the learned Recorder alone, who ruled, as matter of law, that the application was not within section 6.

I am not satisfied that any of these objections ought to prevail. Although the object with which the license was sought was, as I think I must take it, to carry on in the new and old premises the business of a publican in the ordinary way, and not to restrict that business in the manner in which it had theretofore been in fact restricted, I am of opinion that as, in the old premises, the business of a publican was so carried on as to prevent the license lapsing, the difference between the business as theretofore carried on in the old premises, and as it would, or might, be carried on in the old and new, was a difference, not in the business itself, but in the manner in which, and the extent to which, it was carried on, a difference of degree which involves considerations of fact, not of law. It therefore cannot be said, *as matter of law*, that the object of the application was not, in the words of the proviso, to render the said licensed premises more suitable for the

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business carried on therein. Secondly, I hold that, if the magistrates were in law incompetent, the objection to their adjudicating was sufficiently brought to their notice by Mr. Byrne. I do not understand an objection, if valid in law, being answered by an allegation that, although made in fact, it was understood to have been a joke. I am further of opinion that, although the grant of the license upon the condition of payment by the prosecutor of the sum he offered to provide for the extinction of another license would have rendered the license void, the invalidity would arise, not from the offer of the sum, but from the acceptance of this offer as a condition for the grant of the license. The application was legal on its face, and the prosecutor was entitled to have it tried by an impartial Bench. I further hold that although the refusal was pronounced through the mouth of the Recorder, yet, as the jurisdiction to refuse it was vested, not in him alone, but in the Bench generally, the act of refusal must be deemed to have been that of the entire Bench. We cannot inquire which of the Justices it was whose act or opinion directly caused the refusal: *Reg.* v. *Myers* (1). I therefore feel bound to determine the question of bias.

It is alleged against six Justices. As to four of those six, Mr. Eason, Mr. Jacob, Mr. Wallace, and Mr. Booth, the sole allegation is that they were subscribers to the "Irish Association for the Prevention of Intemperance," whose objects were "to secure a diminution in the number of licensed houses," and to organize strong opposition to licensing applications; and whose solicitor opposed the application. As to one of these gentlemen, Mr. Wallace, it has been shown that he is not a subscriber, and it is not pretended that any of the three others took, or were entitled to take, any part in the management or control of the affairs of the Association, or in opposing licensing applications generally, or this particular application. The sole ground relied on as to these three is subscribing to an Association having such objects as I have referred to. As to these three Justices, we expressed our opinion during the argument that mere subscription to such an Association did not *per se* amount to such "real bias" as would render the subscriber incompetent to act as a Justice. As to this,

(1) 1 Q. B. D. 173.

I shall do no more than read a passage from the judgment of Lord Field in *Reg.* v. *Deal* (1), a case much stronger than the present, as it related to a criminal case, a prosecution for cruelty to animals, in which the Association to which the Justice subscribed was the prosecutor :—

"The interest or bias which disqualifies must be real and substantial, and such as was likely to influence the mind, not a mere interest in humanity, or the welfare of society, or an interest in the protection of animals from cruelty. Such an interest would no more disqualify a magistrate than an interest in the suppression of vice. The interest or bias which disqualifies must be an interest or bias in the matter to be litigated—that is, in this case, whether the person prosecuted had been guilty of cruelty to an animal. A mere general interest in the object to be pursued would not disqualify a magistrate. All magistrates and all Judges have general sympathies and feelings of this kind, feelings in favour of the protection of the innocent or the helpless—feelings in favour of the punishment of crime ; but these general feelings or sympathies do not disqualify from sitting in a criminal case. The interest or bias which disqualifies is an interest or bias in the particular case—something reasonably likely to bias or influence their minds in the particular case."

In this judgment I respectfully concur ; and without occupying public time by referring to further authorities, of which there are many, I hold that it has not been shown that any of these four Justices were incompetent to adjudicate.

The objections urged against the other two Justices, Professor Barrett and Mr. Allen, were far more serious, and involve difficult considerations of law. Indeed, as to them, my mind has wavered, not only during the argument, but since. These two gentlemen are members of the executive committee who opposed the application, and Mr. Allen is also one of the honorary secretaries of the Association.

The affidavit of Mr. Byrne states that Professor Barrett took a very active part in the proceedings on the Bench of magistrates, in opposition to the several applications made at the Sessions ; and

(1) 45 L. T. (N. S.) 441.

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that Mr. Allen takes a very active part in the working of the Association; and that he is informed and believes that its secretary sent circulars to each of the magistrates who subscribe to the Association, informing them of the applications for hearing, and requesting their attendance on the Bench. He refers to the Report of the Association for the year 1901, which states, under the heading "Licensing Sessions," that "our work at the various Sessions for the city and county of Dublin has been attended, as usual, by our solicitor and secretary, and with the assistance of counsel in some particular cases." He further states that the application of Mr. Findlater was opposed by Mr. M'Cormick, solicitor, for and on behalf of the Association, on the retainer, and pursuant to the instructions of the Association, and that he gave the names of the Rev. Caleb S. Laird and the Rev. T. Guy Rogers as parishioners opposing the application, but that they allowed their names to be used for the sake of form only, and that they did not in any way employ M'Cormick as their solicitor, and that he acted as solicitor for the Association, and on the retainer of, and for payment by, the Association alone.

Mr. Moriarty, the secretary of the Association, in his affidavit, states that the Association has directed its attention to preventing an undue increase in the number of licenses in Ireland, particularly in the city and county of Dublin, and to other general temperance objects. He says that the executive committee of the Association does not oppose all licensing applications; that as a matter of fact it interferes in only a minority of the licensing applications for the city and county of Dublin; that where there is a *bona fide* objection to any application, on any of the statutory grounds applicable to the case, and a *bona fide* objector, who is prepared to bring those facts before the licensing authority in the interests of the public, it directs its solicitor, and occasionally retains counsel, to act for and in the name of such objector, in bringing the facts and the law applicable to such case before the licensing authority. He states that the meeting of the executive committee, held next before each Licensing Sessions, generally decides whether any, and if so, what applications thereat shall be opposed, and such questions are determined by the majority of the members of the executive committee then present; that, before the Sessions, two parishioners,

the Rev. Caleb S. Laird and the Rev. T. Guy Rogers, communicated with Mr. Moriarty, with the view of making opposition to the prosecutor's application; and that accordingly the solicitor of the Association *was instructed* (by which I understand instructed by the executive committee) *to oppose the application*; and the two objectors were in Court, ready to be examined if necessary. He further says that it is the practice to send circulars, stating the dates of the Sessions, to over one hundred of the magistrates who usually attend the Sessions, and that not one-tenth of these are subscribers to the Association, or in any way connected with it. As to this circular, it has not been proved to have biassed any of the Justices in this particular case, and I shall say no more as to it, than that, for my own part, I disapprove of the practice of sending it, and hope that it will be discontinued.

Professor Barrett has made an affidavit. He states in paragraph 6: "As a matter of fact, so far was I from being prejudiced or biassed against Mr. Findlater's application, that on the contrary I used any influence that I had in favour of it on the executive council of the Association, and was personally prepared to grant it, until it became evident, on the admission of the prosecutor himself, that there was much more in the application than a mere *bona fide* desire to render his existing premises more suitable for the business therein carried on by him."

Mr. Allen has made an affidavit; but he does not state the part, if any, which he took in procuring the decision of the committee that this particular application should be opposed.

It has also been proved to my satisfaction that the fact of being a member of the executive committee, or an officer of the Association, does not pledge the member or officer to act in any particular way in performing his judicial functions as a magistrate, as to which he is left entirely free. It has not been proved that any of the impeached magistrates exercised any influence upon any of their fellow Justices.

Speaking for myself, I must say that I should have been better satisfied if the affidavits had shown more particularly what exactly was the action of the executive committee; and in particular what part in reference to such opposition was taken thereat by Professor Barrett, and (if he were present) by Mr.

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Allen, but, notwithstanding this, I feel bound to bear in mind that the case made in support of this application, and the only ground (irrespective of the circular) upon which the conditional order was obtained, was, that the mere fact of being members of the committee who authorised the opposition, or an officer of the Association, in law amounted to disqualifying *bias*.

This was the principal question argued, and I shall consider it in the first instance. Afterwards I shall see whether there are any other facts relevant to *bias*.

No reason has been suggested why the act of the executive committee, in directing or authorising this opposition, does not bind all its members; and therefore, upon the question of the legal effect of membership of the committee *per se*, I hold that it is immaterial whether Professor Barrett or Mr. Allen were present at the meeting, and whether they supported or not the resolution to oppose. I treat the act of opposition as that of their authorised agent, and the personal act of each of them. Thus the net question for decision is, whether a Justice, by opposing, or retaining a solicitor to oppose, a licensing application, is disqualified from hearing and determining it in his judicial capacity? Were the case before the Sessions an ordinary one between party and party, the case would be too clear for argument. Such action, in such a case, would undoubtedly disqualify. But this is not an ordinary case between party and party, and the important question is, whether the same principle is applicable to a decision of Justices at Licensing Sessions?

In 1893, this question was decided in the affirmative by Cave and Wright, JJ., in *The Queen* v. *Frazer* (1). There, a Mr. Goddard, one of three magistrates who sat to hear and determine an application for a transfer of a license, was a member of the Ipswich Nonconformist Council, one of the objects of which was to oppose the renewal of licenses, and he was present at a meeting at which it was decided that the council should oppose the transfer, and that a solicitor should be instructed to act for the council before the magistrates. Mr. Goddard left the meeting before the resolution was passed, and afterwards took part in

(1) 9 T. L. R. 613.

adjudicating upon the application. The Court made absolute a rule for a *certiorari*. Mr. Justice Cave applying to it the principle applicable to prosecutions, said that "Members of an Association which promotes and initiates the prosecution must not sit upon the Bench. One of the objects of the Association was the refusal of public-house licenses. Mr. Goddard knew that there was to be a resolution to employ a solicitor to oppose this license. A solicitor was appointed, and appeared, and stated that he appeared for the Association, and Mr. Goddard did not disavow it; and therefore he fell clearly within the principle that a member of an Association which promoted the opposition should not sit upon the Bench in dealing with it. I can quite believe that Mr. Goddard would, as he said, have given the same decision if he had not been a member of the council; but that was not the question. The question was, what would be likely to endanger the respect, or diminish the confidence, which it was desirable should exist in the administration of justice"? Wright, J., in concurring, observed: "No one censured Mr. Goddard. He, no doubt, acted from excellent motives and feelings, but contrary to a well settled principle of law, affecting the character of the administration of justice."

Were this case now law, we would be bound to grant this *certiorari*. It is, however, to be observed that the distinction between the duties of Justices in criminal prosecutions and on licensing applications, which was afterwards drawn by the House of Lords in *Boulter* v. *The Kent Justices* (1), and the effect of that distinction on the question of bias afterwards developed in *The King* v. *Howard* (2), does not appear to have been before the minds of either Cave, J., or Wright, J. On the contrary, they assumed that the principle applicable to each class of case was identical. We have, therefore, to consider the effect of these two later cases upon the earlier decisions. In the first of them it was held by the House of Lords that Justices, in granting or refusing licenses in England, were not a Court of summary jurisdiction, within the meaning of the Summary Jurisdiction Act, 1879; and one of the reasons of the Lord Chancellor for arriving at that conclusion was

(1) [1897] A. C. 556. (2) [1902] 2 K. B. 363.

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that the Justices, when acting in that jurisdiction, were not a Court at all (p. 561). "I do not think," says the Lord Chancellor, "they are a Court at all. The whole licensing system has been conducted under a code of its own; and the Act of 1828 has provided a variety of provisions, and has constituted a form of procedure which does not appear to me, primarily, to come under the description of Court." And, later on, he refers to Justices of the Peace acting in the matter of "licensing" as "not occupying the position of Judges at all," but exercising a discretionary jurisdiction as to how many public-houses they would permit in a district, or what persons should carry them on. Lord Watson and Lord Shand concur in this opinion of the Lord Chancellor, so that that case amounts to an actual decision that Justices in Licensing Sessions are not a Court.

The opinion of Lord Herschell, which also is concurred in by Lord Watson, rests on other grounds. One of them is sect. 31, sub-sect. 2, of the Act of 1879, which prescribes that an appellant shall give notice of appeal to the other "*party.*" The grounds of Lord Herschell's conclusion on this question are very material here. He says:—"Persons objecting to the grant of a license are not, I think, parties to the proceedings on the application, in any proper sense of the term. The question is not one *inter partes* at all. The Justices have an absolute discretion to determine, in the interest of the public, whether a license ought to be granted; and every member of the public may object to the grant on public grounds, apart from any individual right or interest of his own. The applicant seeks a privilege. A member of the public who objects *merely informs the mind of the Court*, to enable it rightly to exercise its discretion whether to grant that privilege or not. A decision that a license should not be granted is a decision that it would not be for the public benefit to grant it. It is not a decision that the objector has a *right* to have it refused. It is not, properly speaking, a determination in his favour. It is, I think, a fallacy to treat the refusal as necessarily induced by a particular objector. Every member of the local community might object. Would they all, then, become 'the other party'? There is, in truth, no *lis*, no controversy *inter partes*, and no decision in favour of one of them and against the other, unless, indeed, the entire

public are regarded as the other party; for, if a license be refused on the ground that it was not needed to supply the legitimate wants of the neighbourhood, the decision is really in favour of the public at large."

Now, as the doctrine of the incompetency of a member of a tribunal rests upon the principles of natural equity, embodied in such old maxims as "*Aliquis non potest esse judex et pars*" (Coke Litt., 141*a*), the establishment by the House of Lords of the two principles I have mentioned could not help having profound influence upon cases of the class of *The Queen* v. *Frazer* (1). Their effect upon them appears more prominently in *The King* v. *Howard* (2) than in any other case; and for the purpose I have in hand it is sufficient for me to refer to it alone. The question there was in relation to an application for the renewal of, not, as here, to an original application for, a license. The distinction, however, is immaterial; at least it does not render that decision of less weight as an authority against the prosecutor here. There, the attention of the licensing Justices having been called to the number of licensed houses in their district, they appointed some of their number a committee to investigate and report on the condition, position, and circumstances of the licensed houses. A detailed report was made by the committee, who recommended that all applications for renewal should be objected to, and that notice should be given to each of the licensees to attend at the hearing. This report was adopted, and the Justices at the annual licensing meeting objected through their chairman to the renewal of all the licenses, and directed that notice should be given to each holder of a license to attend at an adjourned meeting. At that meeting evidence was heard upon oath in each case, and the Justices decided against the renewal of nine of the licenses. A *certiorari* to quash these refusals on the ground of bias having been applied for, the decision of the Court of Appeal was that the Justices were entitled to take (or to direct their officer to take) objection to the renewals, and that consequently they were within their rights in making the preliminary investigation; and that the facts that they had done so, that they had adopted the

(1) 9 T. L. R. 613. (2) [1902] 2 K. B. 363.

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report of the committee, and themselves objected to the renewals, did not debar them from hearing and deciding the applications. As I base my judgment entirely on this case, I must be excused for quoting from it at a somewhat inordinate length. The Master of the Rolls, in giving judgment, says:—"The rule *nisi* was obtained on the ground that the Justices were incapacitated from dealing with the question of the renewal of licenses, inasmuch as they were at once parties and Judges, that they had acted upon evidence not taken upon oath as provided by sub-sect. 2 of sect. 42 of the Licensing Act, 1872" (which is in substance similar to sect. 14 of our Licensing Act, 1874), "and that they must be *deemed in law* to be biassed on the ground that they had predetermined to refuse the renewal of some of the licenses, and had already inquired into the cases. In considering how far these points are material, it is necessary to understand precisely what is the character in which the Justices are required by law to deal with questions of renewal. Whatever views may have been held as to their position before *Boulter* v. *Kent Justices* (1) was decided in the House of Lords, it is now clear that in the granting or refusing of renewals the Justices do not sit as a Court, and that the transaction itself is in no sense a '*lis*' to which there are parties. The objector is not a party; his function is merely to inform the mind of the tribunal to enable it rightly to exercise its discretion whether to grant the privilege of a license or not."

"The standard, therefore, to be applied in determining whether Justices have incapacitated themselves from dealing with the renewal of licenses is not in any sense that applicable to Judges dealing with litigation. . . . On the general question whether there is such incompatibility between the position of Justices who adjudicate and that of an objector that the two cannot be combined, it seems to me to be immaterial whether the objection is made personally by the Justices or by somebody else at their instance, and from the reported cases it seems to be a very common practice, and one that has never been questioned, for the objection to be made at the instance of the Justices, if not in their name. . . The key to the position appears to be that the Justices, in dealing

(1) [1897] A. C. 556.

with licenses, are not a judicial body; that they are deliberately appointed because from their circumstances they are likely to have local knowledge; and it cannot have been the intention of the Legislature that they should divest themselves of all such knowledge in dealing with questions of licenses. It would be a great public misfortune if they were bound to determine the question merely on materials provided by the individual who happened to object, and were constrained to sit by in silence, although they had good reason to suppose that there were very good grounds which ought to be inquired into before the matter was decided; and yet, if they were debarred from making an objection or causing one to be made, these facts never could be inquired into, and the license would have to be disposed of without the necessary investigation." These observations apply with even greater force to our Act of 1833 than to the English Act of 1828, as under the latter the Justices have a general jurisdiction to refuse, if there is no objection, whilst under our Act they have only to determine the objections, and in the absence of an objection must grant the license. The Master of the Rolls then continued: "If that be so, the standard to be applied in considering the question of *bias* must be one which admits the right of the Justices to be at one and the same time objectors and judges, in the sense in which they are judges in such matters; and therefore the standard laid down in such cases as *Leeson* v. *General Council of Medical Education and Registration* (1), and *Allinson* v. *General Council of Medical Education and Registration* (2), is not applicable to them. They fall outside their principle, for two reasons—first, that they are empowered by law to fill the two capacities; and secondly, that, rightly understood, the two capacities are not incompatible in the sense in which in those cases they were assumed to be incompatible, because, as has been already pointed out, *in making the objection they do not in any sense become parties to the litigation or anything analogous thereto.* They are simply taking the only, or the best, available course to enable matters vital to the exercise of their discretion to be formally and fairly considered openly before them."

(1) 43 Ch. D. 366. (2) [1894] 1 Q. B. 750.

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Matthew, L.J., says: "I see no reason to doubt the authority of the cases referred to by the Master of the Rolls, which sanction the conclusion that objections may be made from the Bench in open Court, and may afterwards be investigated upon proper notice to the applicant to attend and answer the objections. The argument for the appellant would involve this consequence, that the magistrates, if there were no objector, would be bound to renew the license, although they knew, or had been furnished with reliable information, that the application ought to be refused. But then it was said that, even though objections might be made from the Bench, the Justices, who were parties to the notice to the applicant to attend, could not afterwards sit and adjudicate upon the application. The proceeding would have been regular under the Act of 1828, and it seems to me that there is no ground for saying it was impliedly forbidden by the Act of 1872. But it was urged that the inquiry was in the nature of the trial of an action between the Justices and the applicant, and that those who had instituted the proceedings could not adjudicate upon what was described as their own cause. But, as has been laid down in the case referred to by the Master of the Rolls, in licensing cases there is no '*lis*,' and nothing in the nature of a suit or a prosecution. The duty of the Justices is to arbitrate impartially, not between themselves and the holder of the license, but between that person and the public."

Cozens-Hardy, L.J., although he delivered a separate judgment of his own, stated that he agreed in the reasons assigned by the Master of the Rolls; and therefore it is unnecessary for me to quote any particular passages from his judgment. No doubt this case is under appeal, but notwithstanding that, it would not be decorous in me not to bow to its authority in the same way as I would to a decision of our own Court of Appeal, and I willingly do so.

Later on I shall refer to the distinction which undoubtedly exists between the facts of that case and the present; but, in the first instance, it is right to refer to the argument of Mr. O'Brien, that our Licensing Act of 1833 so differs in language from the English Act of 1828, that upon our Act it is impossible to hold that the licensing Justices are not a Court, and that therefore the

principle of *The King* v. *Howard* (1) has no application in this country.

Now, I go so far with this argument as to hold that, in this country, magistrates, when acting under their licensing jurisdiction, do constitute a Court. Section 3 of our Act of 1833 enacts that the time during the Quarter Sessions at which the names of the applicants are to be called, is "to be fixed by rule of said *Court*," referring to the previous antecedent, "Quarter Sessions"; and the person by whom the names are to be so called is referred to as the "Officer of said *Court*." Thus, the remarkable distinction which, as pointed out by Lord Halsbury, is drawn by the Act of 1828, between the words "licensing meeting," which are used to describe the meeting of the Justices for licensing purposes, and the expression "*Court* of Quarter Sessions," not only does not exist, but the tribunal, when acting in this jurisdiction, is in the Irish Act called a "Court." Again, the duties of the Justices, as prescribed by section 4, are not only "to consider and examine into," but also "to *adjudicate* upon" the objections. This word "adjudicate" does not occur in the English Act. Further, the decision of the Justices is, under the same section, to be embodied in an "*order* in writing." This latter provision is in strong contrast with section 9 of the English Act, which directs that every license is to be signed by the majority of the Justices present; as to which Lord Halsbury observes that "not an *order* of Court, but merely the signature of the majority of the Justices, is required." Lastly, the 12th section of our Act of 1874 (37 & 38 Vict. c. 69) enables the Lord Lieutenant, by Order in Council, to constitute "one of the General or Quarter Sessions of the Peace" to be the only Licensing Quarter Sessions.

For these reasons I am of opinion that, in Ireland, magistrates acting in Licensing Sessions are a Court. But although the circumstance that in England they are not a Court is relied upon by the Master of the Rolls in his judgment in *The King* v. *Howard* (1), I am of opinion that the name of the tribunal, whether Court or licensing meeting, does not make any essential difference with regard to the question in hand. By whatever

(1) [1902] 2 K. B. 363.

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name the tribunal is called, its function, in a case such as the present in Ireland, is identical with that of the licensing authority in England. Since the Act of 1902, the English and Irish tribunals have the same general discretion to grant or refuse. In each country the nature of the application is the same. In each there is no *lis*, no suit, no proceeding *inter partes*. In each the function of the "objection" is the same, to so inform the mind of the tribunal as to enable it rightly to exercise its discretion; in each the tribunal is constituted of persons likely to have local knowledge—knowledge which it was not intended they should discard or ignore. Further, section 4 of the Act of 1833 (3 & 4 Wm. 4, c. 68) expressly empowers any Justice to object: "It shall . . . be lawful for any justice of the peace of said city, town, or county, churchwarden, or other inhabitant of said parish, previously to transmit to, or then and there to deliver in writing to said Clerk of the Peace, or orally to state to said justices in sessions assembled, any matter or objection to such application."

Thus, it will be observed, the right of any person living outside the limited area of the parish to object is made dependent upon his being a Justice. So that the Legislature, whilst it made the existence of an objection a condition precedent to the right of inquiry, seems to have intentionally extended the class of objectors beyond those living in the parish, so as to ensure, if not for the purpose of ensuring, that every member of the adjudicating tribunal shall have a right, by objecting, of inquiring into all the circumstances of the case.

Again, I feel myself bound in reading this section to take into consideration the character of the tribunal, which I obtain from sect. 14 of the Act of 1874 (37 & 38 Vict. c. 69). This section is, in substance, the same as sect. 42 of the Act of 1872 (a section applicable to England only); and it is clear, from a long line of decisions in England upon the latter section (many of which are referred to in *The King* v. *Howard* (1)), that Justices are not rendered incompetent to adjudicate under that section by being objectors. Knowing, from this latter section, this element in their character, I feel bound to bear it in view in construing the

(1) [1902] 2 K. B. 363.

4th section of the Act of 1833, which I accordingly interpret as meaning not merely that the whole bench of Justices, but even one particular Justice, may object, without in either case affecting the competency to adjudicate. Any difficulty which may be suggested to arise in Ireland, by reason of the tribunal having been, by the Act of 1833, constituted a Court, is answered by the same Act, which, according to my construction, expressly enables any member of that Court to be at the same time an objector. "It shall be lawful for any Justice of the Peace to . . . orally state to said Justices in Sessions assembled any . . . objection to such application."

I am, therefore, of opinion that *The King* v. *Howard* (1) is an express authority that the mere fact of objecting does not in this country, any more than it does in England, render a Justice incompetent.

If, then, Professor Barrett and Mr. Allen could, each of them, object, and also adjudicate, however I might prefer that the objection had been taken in their own names, I cannot see that the fact of the objection being in the names of others, or of its being supported by a committee which consisted of others in addition to themselves, can have any greater disqualifying effect on them than it would have had, had it been in their own names. I treat, as I have already said, the objection of the committee as that of each of its members.

The second answer given for the prosecutor here to the applicability of *The King* v. *Howard* (1) is also answered by what I have already said. There, the objection was by the general body of Justices. Here, it is by two only. I am unable to see how, in principle, this can make any difference, because, as I have pointed out, sect. 4 of the Act of 1833 authorises an objection by one Justice on the original application, just as sect. 42 of the Act of 1872, in England, and sect. 14 of that of 1874, in Ireland, authorises an objection by the whole Bench.

The remaining question is, whether, if the mere fact of being an objector does not amount to, or is not evidence of, bias, anything else is proved to induce us to arrive at the conclusion that there was actual bias. This point, although argued,

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was not raised, or, in my opinion, intended to be raised, by either the conditional order or the affidavit, and consequently these two Justices have not had an opportunity of answering some of the suggestions made at the Bar. The ground stated in the conditional order is that a number of the Justices were biassed against the application, "*occasioned by* their being subscribing members, and members of the executive committee, and officers of the Association." I hold that this proceeding was instituted for the purpose of obtaining our decision on the broad question whether subscribing to, or membership of, the Association, or of its executive committee, *per se* worked a disqualification. But, further, I am of opinion that actual bias has not been proved. The only matter upon this head which struck me during the argument, or, as I remember, was relied upon, was the statement in the affidavit of Mr. Moriarty, that "the executive committee did not oppose all licensing applications." From this it was suggested that the committee, for some indirect object, singled out Mr. Findlater's application to be opposed, whilst they remained neutral as to others. I understand the distinction drawn by Mr. Moriarty's affidavit to be between all applications, on the one hand, and applications, on the other hand, to which there is not only a ground of objection, but also a *bona fide* objector, prepared to bring those facts before the licensing authority. As far as I can see, the executive committee acted, as regards the prosecutor's application, in accordance with their general practice, subject only to this, that Professor Barrett appears to have exerted himself with the view of not having this particular application opposed. If bias against the particular application, as distinguished from all applications generally, were to be relied on, the facts on which it was based should have been distinctly charged, so that the impeached Justices would have had an opportunity of explaining them. So far from this being done, Mr. Byrne, in the second paragraph of his affidavit, states that the Association paid counsel and solicitor to oppose *all* applications for new licenses. The prosecutor, if he so wished, might have cross-examined Professor Barrett and Mr. Allen upon their affidavits, as was done in *Malone's Case* (1). He has not done so, and upon the evidence, as it

(1) 3 New Ir. Jur. R. 259.

stands, I am not satisfied that they, or either of them, predetermined the case, or acted from any motive other than that of having the facts brought fully before the Court. Whilst then, on the one hand, I shall, as far as in me lies, always insist upon Justices fairly, and without bias, exercising the judicial discretion entrusted to them, whilst I hold with Lord Halsbury (1) that they cannot, by evasion, attempt to repeal the law which permits public-houses to exist, I must, on the other hand, hold that the mere fact of being a member of the Association in question, or of its executive committee, does not operate as a disqualification to acting as a Justice upon the hearing of an application to which such executive committee has objected. Further, adopting the standard of bias rendered necessary by the double character of objector and adjudicating Justice, which, under the relevant legislation, can be filled by the one person at the same time, I am of opinion that neither Professor Barrett nor Mr. Allen has been shown to have been biassed; and that for that reason the cause shown must be allowed, and the conditional order discharged.

As regards costs, the prosecutor must pay one set of costs, viz. the costs of the four Justices who are not members of the committee, all of whom appeared by the same solicitor and counsel. The other parties should, I think, bear their own costs.

Mr. Justice Johnson, who heard the arguments, but is prevented by judicial business from being here to-day, concurs in this judgment.

BARTON, J.:—

I am also of opinion that no "real and substantial bias" has been established against any Justice who adjudicated upon this application for a license. I rest my opinion upon *R.* v. *Howard* (2), a case of high authority, in which this question of bias in licensing cases has been recently considered. It has been pointed out in the course of the argument that there are certain differences in point of procedure and of terminology between the English and Irish licensing codes, and that there are certain differences between the facts of *Howard's Case* (2) and of the present case. But after making all due

(1) *Sharpe* v. *Wakefield*, [1891] A. C. 181. (2) [1902] 2 K. B. 363.

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allowance for these differences, I am of opinion that the standard of bias, as defined by the Master of the Rolls and the Lords Justices in *Howard's Case* (1), is the standard which we are bound to apply to the present case. It follows that the bias which disqualifies in a case of this kind must be something more than a mere general interest in having objections made to licenses. The magistrates have themselves a statutory right to object in any and every case. The bias must apply to this particular licensing application. Again, the bias which disqualifies in a case of this kind must, in my opinion, be something more than a mere constructive responsibility for the action of others. It must be "real and substantial." It must be something which would be reasonably likely to bias the minds of the particular magistrates in the particular case. In the present case the only two magistrates against whom the charge of bias was seriously pressed are Mr. Allen and Professor Barrett. There is nothing more alleged against them than mere honorary officership of this Association for the Prevention of Intemperance, and mere membership of this executive committee; and the uncontradicted evidence is to the effect that such mere officership of the Association or membership of the committee does not pledge the officer or member to act in any particular way in performing his judicial functions. It is not alleged in any of the affidavits that Mr. Allen ever heard of this case before he took his seat on the Bench. It appears that Professor Barrett knew that opposition was contemplated on the part of the Association to this particular license, and that he exerted his influence to prevent that opposition. Upon this subject Professor Barrett's affidavit disavowing bias is not contradicted, and his truthfulness and *bona fides* are not impugned. This deficiency of proof was not supplemented by any cross-examination of the Justices, as was done in *Malone's Case* (2), recently before this Division. It appears that the committee of the Association lent their solicitor to the opponents of this particular license. Mr. Allen and Professor Barrett were, in one sense, responsible for the action of the committee, of which they were members, whether they took part in that action or not. But a constructive responsibility of that kind seems to me to be insufficient *per se* to establish "real

(1) [1902] 2 K. B. 363. (2) 3 New Ir. Jur. R. 259.

and substantial bias," an essential characteristic of which is that there must be a reasonable likelihood that the mind of the particular magistrate will be affected as regards the particular case in question. Accordingly, sharing the hesitation which my Lord Chief Baron has said has affected his mind in the course of the case, I concur with the judgment of the Court that mere officership of this Association and mere membership of this large executive committee were not sufficient to constitute "real and substantial bias" so as to disqualify these Justices.

I must, however, add that I think it is hardly necessary for our decision to say that, upon this question of bias, *R.* v. *Fraser* (1) was wrongly decided. I quite agree that part of the reasoning of Cave, J., in *Fraser's Case* (1), has been displaced by subsequent cases. I refer especially to that part of Cave, J.'s judgment which treats applications for licenses as analogous to criminal prosecutions. The standard of bias is quite different in a criminal prosecution; but I am not satisfied that the decision in *Fraser's Case* (1), as distinguished from the *ratio decidendi*, was erroneous. There was in that case some actual and personal participation on the part of the impugned magistrate in the proceedings authorising the employment of an advocate to oppose the particular application, as to which the magistrate had to exercise a judicial discretion. That is a circumstance which distinguishes it from the present case. In the present case no actual or personal participation is alleged, such as was proved in *Fraser's Case* (1).

Bearing upon this question I come to a part of the Lord Chief Baron's judgment, which does not seem to me to be necessary for our decision, and from which, with the utmost respect, I feel bound to dissent. I understand the Lord Chief Baron to say:—"Thus, the net question for our decision is, whether a Justice, by opposing, *or retaining a solicitor to oppose*, a licensing application, is disqualified from hearing and determining it in his judicial capacity"; and I understand my Lord to answer that question in the negative. The words which strike me as going further than is necessary for our decision in that passage are the words "*or retaining a solicitor to oppose*"—and it is upon that point that I find myself unable to agree. It is,

(1) 9 T. L. R. 613.

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however, a very important point. It seems to me that, whatever be the standard of bias applicable to cases of this kind, the line ought to be drawn at a Justice actually retaining an advocate for or against an application, and then adjudicating upon it.

The Lord Chief Baron drew this particular inference, as I understood him, from the concluding words of the following passage in the judgment of the Master of the Rolls in *R.* v. *Howard* (1). At pp. 395, 396, the Master of the Rolls said:—"The standard therefore to be applied in determining whether Justices have incapacitated themselves from dealing with the renewal of licences is not in any sense that applicable to Judges dealing with litigation . . . *it seems to me immaterial whether the objection is made personally by the Justices or by somebody else at their instance.*" In my opinion the Master of the Rolls did not intend by these words to sanction the employment by a magistrate of a solicitor to oppose a licensing application to be heard by himself. If we refer to the context in which this passage in the Master of the Rolls' judgment occurs, I think we shall find that the Master of the Rolls, when he spoke of the magistrates making objection "by somebody else at their instance," appears to have had in his mind, not any practice of a magistrate causing an objection to be made by a solicitor employed by him for that purpose, but a practice of the kind established in *R.* v. *Farquhar* (2) of magistrates, where notice of objection had not been made, causing objections to be made, and adjourning the hearing for the purpose of having them adjudicated on. There is nothing new to us in Ireland in a practice of that kind. For example, in *R.* (*Morgan*) v. *Tyrone Justices* (3), where the Court was dealing with a spirit grocer's license, as to which the Justices have no statutory right to object, and the only *legitimus contradictor* is the officer of police, it was pointed out by the Court that the Justices might call the attention of the police to the matter and adjourn the application in order that the objection might be made at a subsequent hearing. I have heard a similar practice recommended as a proper course for Justices to take in ordinary licensing applications, and I have known it to be adopted.

The Master of the Rolls and the Lords Justices in

(1) [1902] 2 K. B. 363. (2) L. R. 9 Q. B. 258. (3) [1896] 2 I. R. 318.

Howard's Case (1) were careful, as it seems to me, to guard against being understood as sanctioning the practice of a magistrate adjudicating upon an application for a license after having done anything which amounted to a predetermination of the particular case. *Howard's Case* (1) was concerned with a preliminary inquiry instituted by the magistrates into the condition and circumstances, not of any particular license or licenses, but of all the licensed houses in the district, and the charge against the Justices was, that they came to the Justices' meeting determined to refuse the renewal, not of any particular license or licenses, but of a certain number of licenses, so as to reduce the total number in the locality. Collins, M.R., pointed out, at p. 378, that the "course which the Justices took involved no predetermination of any kind, but merely secured the full and informed discussion of the whole subject." Mathew, L.J., at p. 380, said:—"The duty of the Justices is to *arbitrate impartially*, not between themselves and the holder of the license, but between that person and the public;" and at p. 381, speaking as to one particular magistrate, "he was not shown to have committed himself to any opinion on the subject of inquiry, or to have taken sides." Cozens-Hardy, L.J., at p. 383, said:—"No question of bias as against a particular license-holder arises." It seems to me that all the members of the Court carefully guarded themselves against being understood as deciding that a Justice might actually identify himself with the opposition to any particular license and adjudicate on it afterwards.

It seems to me to be hardly necessary for our present purpose to discuss the question whether, and if so how far, the licensing Justices in this case constituted a Court properly so called. It must, I think, be conceded that they had to exercise a judicial discretion of some sort. In so doing it was their duty to hear and weigh *impartially* the arguments and views presented by advocates for the applicant on the one side, and for the members of the public opposing the application on the other side. Every one who has any experience of these cases in Ireland knows that, as a general rule, a licensing application is keenly contested by the solicitors and other advocates, who often include among

(1) [1902] 2 K. B. 363.

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THE KING (FINDLATER) v. JUSTICES OF DUBLIN.

Barton, J.

their numbers leaders of the Bar. The present case appears to have been a very good example of a keenly contested licensing application. I cannot suppose that the Legislature, when giving to the Justices a statutory right to object, intended to authorise them to employ advocates to fight *à l'outrance* cases upon which they were themselves to adjudicate. It is one thing to exercise, or to cause to be exercised, a statutory right of objection which may enable a case to be investigated. It is another thing to commit oneself beforehand to employ an advocate to take one side for or against a particular application. The former proceeding seems to me to be consistent with exercising a judicial discretion; at all events it is sanctioned by statute. The latter proceeding seems to me to be inconsistent with the exercise of any judicial discretion. If it could be shown that a Justice sitting and hearing this case had personally taken part in employing a solicitor to oppose this particular application, I would hold that "real and substantial bias" had been proved, and that the Justice was disqualified.

I concur in the decision of the Court, that upon the evidence before us in the present case—in which nothing was proved except mere honorary officership of, and mere membership of the committee of this Association, without any circumstance pointing to a predetermination of this particular case—"real and substantial bias" has not been proved. I cannot, however, agree, and I do not think it necessary for our present decision to hold, that it is the law that in a licensing application a Justice can adjudicate in a case in reference to which he has actually taken part in employing the advocate on one side or the other.

WRIGHT, J., concurred in the judgment of PALLES, C.B.

Solicitor for the prosecutor: *Gerald Byrne.*
Solicitor for Henry J. Allen: *H. J. M'Cormick.*
Solicitor for the objectors: *H. J. M'Cormick.*
Solicitors for Charles Eason, Charles E. Jacob, Richard Booth, and William Wallace: *D. & T. Fitzgerald.*
Solicitor for W. F. Barrett: *W. Geoghegan.*
Solicitor for the police authorities: *Sir P. Coll.*

J. L.

THE LORD MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF BELFAST *v.* HILL (1).

K. B. Div. 1903.

May 13, 14. June 22.

(1902. No. 5829.)

County Antrim and Belfast Borough Act, 1865 (28 & 29 *Vict. c. clxxxiii*), *ss.* 86–89—*Belfast Borough Act*, 1868 (31 & 32 *Vict. c. cxvii*), *s.* 23—*Street—Expenses of sewering, paving, &c.—Liability of owner of buildings and lands adjoining—Change of ownership before demand of payment—Footpath—Dedication.*

The plaintiffs, the Belfast Corporation, had made an order, under sect. 86 of the County Antrim and Belfast Borough Act, 1865, for the sewering, flagging, paving, &c., of a street in the city of Belfast, which order, accompanied by the surveyor's estimate of the expenses and the shares thereof payable by the several owners of buildings and lands adjoining the street, was duly published and posted as required by the Act. At the date of the order the defendant was an owner, within the meaning of the Act, of lands, subject to a mortgage, adjoining the street, and he continued owner for a period of more than a month after the last publication of the order. The defendant never executed the required works, and his share of their estimated expense was demanded from him by the plaintiffs. At the time of making such demand the defendant had ceased to be owner, the mortgagees having entered into possession and receipt of rents:—

Held, that the defendant was liable for the amount demanded, notwithstanding that he had ceased to be owner when the demand was made.

The defendant, who held under a lease for a long term of years, had built on the lands a number of cottages, and had made, for the benefit of the tenants of these cottages, a footpath on the lands in front of the cottages and bordering the street in question, the whole forming apparently a street consisting of a roadway and this footpath. The order for sewering, &c., made by the plaintiffs included this footpath:—

Held, that there was jurisdiction to make the order in respect of the footpath.

MOTION on behalf of the defendant that the judgment ordered to be entered for the plaintiffs at the trial of the action be set aside, and judgment entered for the defendant, with costs, or for a new trial.

(1) Before LORD O'BRIEN, L.C.J., and JOHNSON and GIBSON, JJ.

K. B. Div. 1903.

CORPORATION OF BELFAST *v.* HILL.

The action was brought to recover the sum of £213 2*s.* 10*d.*, the share of the estimated expense of removing obstructions, sewering, draining, levelling, flagging, paving, and otherwise completing portions of Connsbrook-avenue, in the city of Belfast, payable by the defendant as one of the owners of buildings and lands adjoining such street, under an order of the plaintiffs made under the authority of the County Antrim and Belfast Borough Act, 1865; Belfast Borough Act, 1868; Belfast Improvement Act, 1878; and Belfast Corporation Act, 1896. The action was tried before Wright, J., and a common jury of the city of Belfast at the Spring Assizes, 1903, held in Belfast, and the learned Judge directed a verdict for the plaintiffs for the amount claimed with costs.

The facts, and the nature of the arguments, sufficiently appear from the judgments.

Hume, *K.C.*, and *Bulloch*, appeared for the defendant.

Gordon, *K.C.*, and *Harrison*, *K.C.* (with them *Thos. Harrison*), for the plaintiffs.

Cur. adv. vult.

June 22.

JOHNSON, J.:—

By lease of 18th November, 1895, a piece or parcel of building ground containing about 3A. 0R. 26P. was demised to the defendant, Hill, bounded "on the north by a *new road* known by the name of" (blank in the lease), for a term of 9000 years, at the yearly rent of £12, payable half-yearly. The demised premises at the date of the lease were outside, but by the Belfast Act of 1896 are within, the borough boundary; they consisted of a field or fields divided by a hedge from the *new road* mentioned in the lease, which, about or shortly after that time, was known as *Fourth-avenue*, and subsequently and now as *Connsbrook-avenue*. At the time of the lease this new road was laid out and set out; but when, by whom, or under what circumstances, does not appear: it was not levelled or stoned, and varied in width from 30 to 40 feet. The defendant's demised frontage to this road was about 107 or 108 yards, and nearly the whole of one side; at one end two or three posts driven

into the road rendered it impassible for through cart traffic; but at the other end it was open for all traffic, and throughout was open from end to end, and used by the pedestrian public without hindrance or obstruction. The defendant entered into possession under his lease, and built twenty-two cottages on the demised land facing the road; he removed the hedge, and about 6 feet in depth, inside the removed hedge and in front of the cottages he erected iron railings with gates in them, affording access from the road to the cottages; this strip of land, between the iron railings and the site of the removed hedge, he coated with cinders, presumably for the convenience of the tenants of his cottages; but, with the exception of this coating of cinders, there was no visible distinction between the iron railing and the rest of the road widened by the addition of this strip of land, thus forming part of the entire road surface, and thenceforth used by the public as the road in its original condition had been used before the hedge was removed. I am not impressed by the fact that the road is in the lease of 1895 termed a *new road*. It is common knowledge that in the country parts of Ireland a road for the first time laid out is locally known as the new road, and for years is known by that appellation, until by law or usage it acquires a more specific denomination.

By what, in the argument, has been treated as a sub-lease, dated 21st November, 1898, the defendant demised to Clements, for the residue of the term of 9000 years, at a yearly rent of £64, the premises comprised in the lease of 1895, with the twenty-two cottages thereon erected. In this sub-lease the parcels are described by boundaries, with admeasurements of feet and inches, and are delineated on a map annexed to the sub-lease. By the scale in this map the north boundary (the Fourth-avenue, or Connsbrook-avenue) corresponds exactly with the iron railings, leaving the whole area on the road side of the railings as part of the Fourth-avenue, or Connsbrook-avenue. Clements does not appear to have entered under this sub-lease, but he used it in 1898 to raise £1400 on a mortgage of it, which I have not seen, and in September, 1900, he assigned his equity of redemption on the mortgage to the defendant, who thus, in the result, is beneficial owner of the premises for the residue of the term of 9000 years, subject to Clements' mortgage. Notwithstanding this sub-lease and mortgage,

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the defendant Hill continued from the lease of 1895 up to and at the times of the publication and posting of the order of the plaintiffs (1st November, 1901) to receive the rents (admitted to be rack-rents) of the premises demised by the lease of 1895, and was, therefore, the "owner" within the definition of the Belfast Act, 1865, section 106. By this order (1st November, 1901), under the Belfast Act, 1865, section 86, it was ordered that part of Connsbrook-avenue (including the frontage of the premises demised by the lease of 1895) should be freed from obstruction, sewered, drained, levelled, flagged, and paved within the time and in the manner by the order directed. This order was duly published and posted as required by section 87, and therefore was sufficient notice to all owners and others interested in the lands or buildings in that part of Connsbrook-avenue, including the defendant Hill. The order when so promulgated was, under section 88 of the Act, accompanied with the surveyor's estimate of the expenses of the works so ordered, and of the apportioned shares payable by the contributory owners of the buildings or lands in Connsbrook-avenue. The defendant's apportioned share of the estimated expenses was the sum of £213 2*s.* 10*d.*, sued for in this action. No objection was made to this apportionment. The last posting of this order was made on the 27th November, 1901, and the defendant was then *owner*, being in receipt of the rack-rent of the premises in respect of which his share of the estimated expenses was so apportioned. Hill, the defendant, was not superseded in or displaced from his receipt of the rents until Clements' mortgagees entered into possession on 13th January, 1902, on foot of their mortgage of 1898, although Hollywood, his agent, ceased to receive the rents (weekly rents) for him after 16th December, 1901. Payment of defendant's apportioned share of the estimated expenses (£213 2*s.* 10*d.*) was demanded from him on 25th January, 1902, and several times subsequently, and not having been paid, the present action was commenced on the 8th May, 1902.

For the defendant it is argued, 1st, that Connsbrook-avenue, including the strip between the iron railings and site of the removed hedge, was not a street within section 86 of the Act of 1865, in respect of which the plaintiffs had authority to make the order of 1st November, 1901; 2nd, that the defendant Hill is not

liable to the plaintiffs in this action for the share of the estimated amount of the expenses apportioned to him, because he was not the *owner* on the 25th January, 1902, when payment was demanded from him, Clements' mortgagees having entered into possession on the 13th January, 1902.

As to the first contention, sect. 86 of the Act of 1865 is not confined to the term "street"; its scope is "any street or road formed, set out, or laid out," and by the Act of 1868, section 23, sections 86 to 90 of the Act of 1865 are made applicable to all streets or roads within the borough set out, or laid out after, as well as before, the Act of 1868. By the Act of 1865, section 106, the terms "*street*" and "*lands*" have the same meaning as in the Belfast Act, 1845, by which (section 420), unless there is something repugnant in the context, "*street*" includes (*inter alia*) all or any part of any present or future street, highway, lane, road, thoroughfare, or public passage, or place within the borough, as well footway as carriageway; and "*lands*" extends to any messuages, lands, houses, tenements, and hereditaments of any tenure. To constitute Connsbrook-avenue a street or road within section 86 it is not necessary that it should in all or part have been dedicated to the public as the law understands dedication, nor that it should be entirely open throughout to all kinds of public traffic. Even if it was a private road with these twenty-two cottages facing it, I think the Corporation of Belfast had authority to make and promulgate the order of 1st November, 1901: *Daw* v. *London County Council* (1); *Midland Railway Company* v. *Watton* (2). Most of the authorities are conveniently collected in Mr. Vanston's Book on the Public Health Acts (Ireland), pp. 12–14. One of the principal objects of these statutes is to promote public health by securing the execution of works on private property calculated to render them not only healthy in themselves, but innocuous to the public health: Field, J., *Grece* v. *Hunt* (3).

As to the second contention: the order of the 1st November, 1901 (duly made and published under sections 86 and 87 of the Act of 1865), *thereupon* required the then owner (the defen-

(1) 59 L. J. M. C. 112, 115. (2) 17 Q. B. D. 30. (3) 2 Q. B. D. 389, at p. 393.

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dant) to execute his part of the work within the time, and in the manner, expressed in the order; and, by sect. 88 the surveyor's estimate of the expenses of the work required by the order, and which accompanied the publication of the order, informed the defendant of the share of the estimated expenses which would be payable by him as such "*owner*." This statutory duty and liability of the defendant accrued and commenced with the publication of the order and the accompanying estimate, and thenceforth continued.

The defendant did not within one calendar month from the last publication of the order, nor did any other person "*commence the work required by the order to be done by him*"; therefore by sect. 89 (1) it is provided that "*such owner*" (viz. the *owner* identified by the earlier part of sect. 89, as the *owner* who has not commenced the work which the order *required to be done by him*: in this case the defendant) "shall *on demand* pay to the Corporation the amount of the share *payable by him* of the expenses estimated as aforesaid" (viz. his (defendant's) share of the estimated expenses, of which he had notice, and was apprised on the publication of the order, and its accompanying estimate). This demand, therefore, was a condition precedent to proceedings by legal process against the defendant personally to recover his share of the estimated expenses published with the order of 1st November, 1901; but I find nothing in the statute requiring this demand to be made while he continued such owner as he was when his estimated share was ascertained and published with the order. The class of English authorities, of which *The Queen* v. *The Swindon Local Board* (1) is a representative case, does not appear to me to govern the present case, because the statutes in those cases did not provide for recovery of a share of expenses estimated when the work was ordered, but only enabled the local authorities, where the owner did not execute the work, to do the work themselves, and then recover the cost from the owner who was held to be the owner when, and not before, the work was done. The enactment of the Belfast Act is wholly different, and renders the person who is owner when the order, with the accompanying

(1) 4 Q. B. D. 305.

amount of his share of the estimated expenses, is published, the person who, if the work is not commenced within a month, is to pay such estimated share to the Corporation. I should have thought this sufficiently clear on the construction of the Belfast Act; but since the argument I have found a case which appears to me in point: *The Tottenham Local Board* v. *Williamson* (1), tried by Lopes, L.J., without a jury. In that case, distinguishing *The Queen* v. *The Swindon Board* (2), it was held that on the terms of a local Act similar in this respect to the Acts in the present case the person who was the *owner of the premises when the expenses of the works to be executed were estimated*, and not the person who was the owner when the work was done, was and remained the owner liable for the payment of the apportionment of the estimated expenses. I, therefore, think that verdict and judgment are right, and should be retained.

The Lord Chief Justice, who is engaged at *Nisi Prius*, desires me to state that he concurs in this judgment.

GIBSON, J.:—

Two questions have been argued before us: was there jurisdiction to make the order as to the strip of ground occupied by the cindered footpath? and was the defendant an owner on whom the demand under the order for the estimated share of the expenses could properly be made?

As to the first question, it was assumed on both sides that if there was no jurisdiction to make the order as to part, this would be an answer to the whole demand, the order being treated—like a rate—as entire. Whether this is so or not, I express no opinion, as the matter has not been argued.

It was not disputed by defendant's counsel that Connsbrook-avenue proper was a street to which the local statute of 1865 applied, and that it vested in the road authority. The meaning of the expressions "street" (the subject of statutory definition) and "vest" was the subject of some discussion, but the authorities, such as *Robinson's Case* (3), *Allen's Case* (4), and *Reg.* v. *Goole*

(1) 62 L. J. Q. B. 322; 9 T. L. R. [372.
(2) 4 Q. B. D. 305.
(3) 8 App. Cas. 798.
(4) [1899] 1 Q. B. 681.

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Local Board (1), as to "street," and the *Finchley Case* (2) as to "vest," make it unnecessary to discuss the matter. There was evidence that the path in dispute was apparently part of the street, Connsbrook-avenue: *Wilson* v. *Vestry of St. Giles, Camberwell* (3), and if a street, whether private or not, it would vest in the plaintiffs: *Armstrong* v. *London County Council* (4); *Midland Railway Company* v. *Watton* (5); *Reg.* v. *Goole Local Board* (1).

Defendant's counsel, however, contend that the footway was never dedicated at all by the defendant, and that plaintiffs had no right to treat it, *in invitum* and without compensation, as vested in them. Plaintiffs' counsel reply that where there is one apparent street, consisting of road and footpaths, as one entity, it would be inconvenient if the question of vesting should depend on some antecedent title from dedication, of which the road authority, who must act on physical appearance and user, may know nothing; they contend that there is jurisdiction to make the order where there is a possessory vesting of what is used, in fact, as a street; and that defendant should establish his adverse title (if any) by some independent proceeding. I am not, however, compelled to decide this question, as, in my opinion, there is here sufficient evidence that defendant dedicated the pathway for public use in connection with his houses fronting the street, and as part of the street as it then was. If the road as a private street would vest in the plaintiffs, so would this pathway, which under the definition would be, as the authorities show, itself a new street. The inference of dedication may fairly be drawn, as it was in the analogous case: *Attorney-General* v. *Esher Linoleum Co.* (6). The path was made for the convenience of the tenants of defendant's houses, and the plan on the sub-lease represents the path as outside the demised premises fenced by the railing, and as forming part of the street. The tenants, as against defendant, were entitled to insist on their right to use the path so described. So far as he could as termor, the defendant dedicated the path, and no subsequent change of intention on his part or demand for compensation could undo the appropriation which, if once made, was irrevocable. Whether the

(1) [1891] 2 Q. B. 212.
(2) [1903] 1 Ch. 437.
(3) [1892] 1 Q. B. 1.
(4) [1900] 1 Q. B. 416.
(5) 17 Q. B. D. 30.
(6) [1901] 2 Ch. 647.

path was a private street or a public street, it falls within the plaintiffs' jurisdiction. How far the owner in fee would be bound, and how the case would stand at common law, does not now require discussion. I referred to this question in *Smith* v. *Wilson* (1).

It is urged that the learned Judge ruled that, apart from dedication by the defendant, the path in its *de facto* state vested in the plaintiffs. This supposed ruling does not appear from the report; but assuming that the Judge ruled that there was no sufficient proof of dedication (as would appear from the report of the case in 3 New Irish Jurist, at p. 202), he may have had in his mind common law dedication where the fee is bound, and dedication of the strip as part of a *public* street. If the Judge thought that there was no evidence of dedication of any kind by the defendant, I could not agree with him. There was evidence to warrant an inference of at least limited dedication. The first objection to the judgment therefore fails.

2. The second question (which was that mainly argued) turns (as is admitted) entirely on the meaning of the words "such owner" in the local Act, 1865, section 89, sub-sect. 1. Apart from case law, and without embarrassing myself with speculative difficulties (which, indeed, apply more or less to any construction of the words), I would think that the owner on whom the demand is to be made would be the owner spoken of in the preceding sections, who was then in default for not doing the work ordered, and who is referred to in the estimate lodged. Though there may be no actual personal debt till demand, the substantial liability would seem complete when the antecedent conditions prescribed by sections 86, 87, and 88 are satisfied. The Act of 1865 proceeds on the basis of estimate, and differs from the Public Health Act, 1875, sections 150 and 257, under which, after service of the statutory notice, the charge on the premises accrues on the completion of the works: *Stock* v. *Meakin* (2), *Surtees* v. *Woodhouse* (3), when the Statute of Limitations begins to run: *Hornsey Local Board* v. *Monarch Investment Building Society* (4), notwithstanding that the owner to be charged cannot, pending

(1) [1903] 2 I. R. 68, 69.
(2) [1900] 1 Ch. 683.
(3) [1903] 1 K. B. 396.
(4) 24 Q. B. D. 1.

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any dispute as to the apportionment, be personally sued: *Sandgate District Local Board* v. *Keene* (1). The charge affects the inheritance, and a tenant for life paying it off is entitled to keep it alive as an incumbrance: *Re Smith* (2). Section 267 contains wide powers of service, extending apparently to cases where the owner is not known.

The Belfast Act of 1865 resembles the Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 105, in making estimate the basis of charge. This English Act enables the vestry or district board to pave a new street, and imposes on the owners of the houses forming such street the liability or demand to pay the *estimated* amount of such expenses; in case the estimate exceeds the actual expenses, the difference is to be repaid to the owners by whom the money has been paid; in case the estimate is less than the actual expenses, the owners shall on demand pay such further sum as, with the sum already paid, amounts to such actual expenses.

This provision does not impose on the owners the duty of doing the works themselves, as section 86 of the Belfast Act expressly does. The owner under this statute cannot be described therefore as a defaulting owner till demand.

There is no direct authority on 18 & 19 Vict. c. 120, s. 105, but there is a dictum of Kelly, C.B., in *Plumstead Board of Works* v. *Ingoldby* (3), that under that enactment, standing alone, the board could not have recovered from subsequent owners (see also *Blithing Union* v. *Warton* (4)). There is much stronger ground for applying a similar construction to the Belfast Act, 1865. The liability of the owner arises on his default in complying with the order under sect. 86, and that order imposes an absolute obligation to obey it (*Mayor, &c., of West Hartlepool* v. *Robinson* (5)). It would seem that the premises became chargeable by virtue of the order and estimate, apart from the execution of the works. The word "payable" in section 101 does not, any more than in section 88, import the existence of a prior demand on the owner. In the Public Health Act, 1875, section 267 enables service to be

(1) [1892] 1 Q. B. 831.
(2) [1901] 1 Ch. 689.
(3) L. R. 8 Ex. at p. 67.
(4) 3 B. & S. 352.
(5) W. N., 1897, p. 12.

had by addressing "the owner" without naming him; and thus service on a reputed owner may be sufficient (*Wirrall Rural Council* v. *Carter* (1)). There is no similar provision in the Belfast Act, and the actual legal owner, as defined, must be served. It might be impossible to ascertain or serve such owner. No one might be in actual receipt of the rent, either by reason of death, absence of the owner, or the title being unknown, or otherwise. The inheritance is charged under section 101, and a tenant for life paying off the incumbrance could raise it by mortgage (*Re Smith* (2)). It is quite possible that when the works are executed the true owner may be unknown, and still the premises might be liable. No doubt, under sub-sections 3 and 4 of section 89, subsequent owners may be included. New owners may come into being during the completion of the work, and the premises being chargeable under section 101, these new owners might be compelled to pay the excessive original estimate (as contemplated by sub-sect. 3), or the extra cost in respect of an insufficient estimate (as contemplated by sub-section 4). Still, these sub-sections do not contain the word "such," which is restrictive in its application to the original personal liability arising out of the order and estimate.

Whether a demand could be made under sect. 89, sub-sect. 1, of the statute of 1865, against a succeeding owner of the premises charged, so as to impose on such owner personal liability, is not now before us for decision. Under sect. 96 of the Act of 1878 successive owners were expressly made liable. But whether successive owners could be made personally answerable under the Act of 1865 or not, it seems to me that the original defaulting owner is "such owner" within sect. 89, and must pay the estimated charge when demanded. The difficulties suggested as to the case of a sale by the defaulting owner only arise if the parties misconstrue the statute, and act in disregard of their legal rights and liabilities. The vendor, who may be made personally liable, should see that the purchaser who is to get the benefit of the outlay on the new street should indemnify him. The supposed difficulties apply as much to the defendant's construction as to that

(1) [1903] 1 K. B. at p. 651. (2) [1901] 1 Ch. 689.

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submitted by the plaintiffs. Thus, if the demand was made on the owner, and he then sold, he would unquestionably be responsible, notwithstanding that the works were begun and completed during the period of the purchaser's ownership, and notwithstanding that such purchaser, and not the vendor, alone was benefited.

The demand referred to in sect. 89, sub-sects. 1 and 4, may be a condition precedent to suing the owner personally (*Grece* v. *Hunt* (1)); but the default of the owner mentioned in the order and estimate is what, in substance, founds the liability and makes the premises chargeable. The case mainly relied on by defendant's counsel, *Reg.* v. *Swindon Local Board* (2), is distinguishable. It was decided on the Public Health Act, 1875, which, after service of the statutory notice on the then owner, makes the liability accrue on the completion of the works. Here the statutory conditions as to order, estimate, and advertisement, were fulfilled; and the default of the owner and chargeability of the premises were ascertained while the defendant continued owner. The demand is only a condition to the personal remedy. The premises may be chargeable, though the owner cannot be personally sued (*Stock* v. *Meakin* (3); the *Sandgate Case* (4)). The *Swindon Case* (2) has been criticised; but as it was decided on quite different legislation, I need not consider it further, as it is not in point.

It is argued that the definition of "owner," which embraces an agent, makes it impossible to suppose that a person who had ceased to own could be charged as owner. Any construction of the term "such owner," however, appears obnoxious, more or less, to the same difficulty. An owner on whom a demand, founded on the prospective estimate, was made, would certainly be liable, though he afterwards, and before the works were finished, sold to someone else. In *Broadbent* v. *Shepherd* (5) an agent who had resigned his agency was made responsible in a prosecution for a nuisance which it was no longer in his power to remove. The agent is personally liable, though he has received no rent, and the premises are unlet (*Mayor of St. Helens* v. *Kirkham* (6)). The

(1) 2 Q. B. D. 389.
(2) 4 Q. B. D. 305.
(3) [1900] 1 Ch. 683.
(4) [1892] 1 Q. B. 831.
(5) [1901] 2 K. B. 274.
(6) 16 Q. B. D. 403.

obvious and natural meaning of the legislation cannot be deflected because, in exceptional cases, there may be apparent hardship.

The definition includes "successive owners from time to time." It is comprehensive, but does not operate to produce confusion of time and person. Who is the owner liable at any particular time must be ascertained from the particular section. A past owner is not a present owner, and a present owner is not a future owner. A successive owner is not, by force of the definition, made answerable for the default of an actual owner. Otherwise, sect. 96 of the Act of 1878 would be redundant and unmeaning.

When the demand was made it is conceded that defendant was not owner; but he was owner at the time of the order, advertisement, and estimate, and during the month following the last publication of the order. He might therefore be described as a defaulting owner.

There appear to be three possible interpretations of the phrase "such owner" in sect. 89, sub-sect. 1—(1) the person who filled the character of owner referred to in sections 86, 87, 88, and 89; (2) that particular person, if—but only if—he continues to be owner at the time the demand is made; (3) the person (whoever he may be) who happens to be owner when the demand is made. This last construction deletes the word "such," and is therefore, I think, inadmissible. The second would, in many cases, make the Act unworkable. The first seems best to fit the language and grammar, and I adopt it.

Since writing this judgment my brother Johnson has shown me the case of *Tottenham Local Board* v. *Williamson* (1), in which the judgment of Lopes, L.J., seems in point, and supports my view.

Both the defendant's objections fail, and the verdict and judgment, therefore, stand.

Solicitor for the plaintiffs: *Sir Samuel Black.*
Solicitor for the defendant: *J. L. Galway.*

J. G. T.

(1) 62 L. J. Q. B. 322.

Appeal.
1903.

In re M'HUGH (1).

Oct. 27, 28. *Bankruptcy—Certificate of conformity—Failure to pay* 10*s. in the* £*—Circumstances for which the bankrupt could not be justly held responsible—Section* 56 *of the Bankruptcy (Ireland) Amendment Act,* 1872 (35 & 36 *Vict. c.* 58)*—Damages and costs in an action for libel.*

The bankrupt was sued by F. for libel, and the action resulted in a verdict for the plaintiff for £3500 damages. The plaintiff's costs were taxed at £303 13*s.* 11*d.* On the petition of F., M. was adjudicated bankrupt. The total debts proved (including the debt of £3803 13*s.* 11*d.*) amounted to £4167 19*s.* 6*d.*; and the total assets realized amounted (after payment of costs) to £1470 9*s.* 8*d.* This included two endowment policies of insurance effected by the bankrupt for the benefit of two members of his family, which had been given up, and had realized £766. The estate had paid a dividend of 7*s.* 6*d.* in the £:—

Held (affirming the decision of Boyd, J.), that the failure to pay a dividend of 10*s.* in the £ did not arise from circumstances for which the bankrupt should not be justly held responsible, and that the bankrupt was not entitled to his certificate.

Appeal from the order of Boyd, J., dated the 28th July, 1903, refusing an application by the bankrupt for a certificate of conformity.

The bankrupt was the proprietor of a newspaper called the *Sligo Champion*. In 1902 an action for libel was brought against him by W. R. Fenton, the Crown Solicitor for Sligo, which resulted in a verdict for the plaintiff with damages for £3500. The costs were taxed at £303 13*s.* 11*d.*, making a total of £3803 13*s.* 11*d.* On the petition of Fenton, M'Hugh was adjudicated bankrupt on the 28th August, 1902. The interest in the premises in which the newspaper was carried on and the machinery were mortgaged, and that portion of the estate, including the movable chattels, was sold by the assignees for £1650. The debt due to the mortgagees amounted to £1332 18*s.* 6*d.*, and consequently the

(1) Before Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.

sum of £300 was available for unsecured creditors. Two endowment policies of insurance for £500 each, which had been taken out by the bankrupt for the benefit of his daughters, were realized by the assignees, and produced £766 10*s.*, being their surrender value. A further sum of £190 was realized by the sale of premises in Thomas-street, Sligo. Certain debts due to the estate were estimated to produce £50. The debts proved amounted to £4167 19*s.* 6*d.*; this included Fenton's debt of £3803 13*s.* 11*d.* The entire estate had been realized, and the bankrupt had given every asistance and all necessary information in getting in the assets. A dividend of 5*s.* 6*d.* in the £ had been paid, which absorbed £1146 3*s.* 8*d.*, and there was a balance in Court to credit of £324 6*s*; it was expected that this balance would pay a further dividend of 2*s.* in the £.

The bankrupt passed his final examination on the 2nd June, 1903. In an affidavit, filed in support of the application, the bankrupt stated that the sole cause of his bankruptcy was the verdict and costs in the action of *Fenton* v. *M'Hugh*; that he was not actuated by any personal feeling or ill-will against Fenton; and in the matter concerning him, which resulted in the action, he acted entirely on public grounds.

On the 28th July, Boyd, J., refused to grant a certificate of conformity, and from that order the bankrupt appealed.

O'Brien, K.C., and *J. J. Clancy*, for the appellant:—

The sole cause of the bankruptcy was the action for libel, and except for the damages and costs in that action, M'Hugh was perfectly solvent, and could have paid every debt he owed. Moreover, he has stated that he was not actuated by any personal motive towards the plaintiff in the action; and he could by no means foresee at the date of the publication that an action would be brought, or that it would result in such very heavy damages. In addition to that, he has given up these two policies of insurance which have brought in substantial amounts, and has assisted the assignees in every way to realize his estate. The estate has paid 7*s.* 6*d.* in the £, and under the circumstances he ought to get his certificate. The words in the corresponding section of the English Act (46 & 47 Vict. c. 52, s. 32) are "misfortune without

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misconduct," and the interpretation of these words was considered in *Re Lord Colin Campbell* (1). In *Re Swabey* (2) it was held that suspension of a certificate for a long period—such as five years—should be reserved for very bad cases. In *Re Burgess* (3) it was held that "misfortune without misconduct" means pure misfortune without fraud or bad conduct. *Re Griffiths* (4)—a decision under the English Act of 1861 (24 & 25 Vict. c. 134, s. 159)—laid down that the suspension of an order of discharge should not be made a penal thing.

Here the bankrupt has not committed any fraud, nor has he lived extravagantly and beyond his means; nor has he speculated rashly. The case, we submit, comes within the decision of *Re Davitt* (5).

O'Shaughnessy, K.C., and *Robert Doyle*, for the assignees, were not called upon.

Oct. 28.

Lord Ashbourne, C.:—

We do not think it necessary, after the full and careful arguments which we have heard from Mr. O'Brien and Mr. Clancy, to ask for further assistance from counsel in this case.

This is an appeal from an order of Boyd, J., made on a motion by the bankrupt to grant him a certificate of conformity under section 56 of the Bankruptcy Act, 1872, when the Judge felt that he was constrained by the very clear words of that section to refuse the application, and from this order the bankrupt has appealed.

The terms of the section have been referred to more than once during the argument, and it is obvious that it was framed with care. Its language is extremely clear. The earlier portion of it provides that "when a bankrupt has passed his final examination in a bankruptcy heard before the Court under the provisions of the said Act, as amended by this Act, or when a bankruptcy wound up by a trustee, and a committee of inspection as hereinafter provided has closed, or at any time during its con-

(1) 20 Q. B. D. 816.
(2) 76 L. T. 534.
(3) 4 Morell, 186.
(4) 10 Jur. (N. S.) 785.
(5) [1894] 1 I. R. 517.

tinuance with the consent of the creditors . . . the bankrupt may apply to the Court for a certificate of conformity." Then follow these strong words, as mandatory as words can be:—"But such certificate shall not be granted unless it is proved to the Court that one of the following conditions has been fulfilled:— In a bankruptcy heard before the Court under the provisions of the said Act, as amended by this Act, that a dividend of not less than 10*s.* in the £ has been paid out of his property, or that his bankruptcy, or the failure to pay £10*s.* in the £, has, in the opinion of the Court, arisen from circumstances for which the bankrupt cannot justly be held responsible."

It is difficult to conceive a section framed with stronger language to indicate that the conditions laid down must be satisfied before a certificate is granted. "Such certificate shall not be granted unless" the conditions are satisfied. Now, the first condition admittedly has not been satisfied, because 10*s.* in the £ has not been paid. It is the second condition with which this case is conversant, *i.e.* that the failure to pay 10*s.* in the £ has, in the opinion of the Court, arisen from circumstances for which the bankrupt cannot justly be held responsible. It is true that in the argument addressed to us our attention has been directed to other words in another Act of Parliament, and to the way in which they have been dealt with. Arguments from analogy are always useful; but we have to consider the particular section before us, and its bearing on the facts of the case. The words, to which I have referred, are found in our own statute which regulates the administration of bankruptcy business in this country. Was it possible, or competent, for the Judge to arrive at a conclusion other than what he did?

Davitt's Case (1), which was so often referred to, is quite different in its circumstances, and one has only to read the facts of that case to see the clear grounds of distinction. In the present instance we have to deal with a different set of facts. Mr. M'Hugh was the owner of a newspaper, in which words had appeared which were charged as a libel. The jury returned a verdict for the plaintiff with large damages, and in the result Mr. M'Hugh was

(1) [1894] 1 I. R. 517.

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adjudicated bankrupt. Under these circumstances, could it be held that a Judge should certify that he could not justly be held responsible for not having paid 10*s.* in the £? The Judge has decided that under the Act of Parliament he could not do so, and that though he was bound by the decision in *Davitt's Case* (1), it was distinguishable from the present, and that Mr. M'Hugh could not escape from the consequences of what brought him into Court. In my opinion the decision of Boyd, J., is right, and should be affirmed, and the appeal dismissed with costs.

Fitz Gibbon, L. J.:—

In my opinion, the provision upon which the case depends, the Irish Bankruptcy Act, 1872, section 56 (1), is prohibitive, and I cannot, on any intelligible construction of it, see my way to declare that the order asked for can be granted. The material words are these:—

> "The certificate *shall not be granted unless* it is proved to the Court that the failure to pay ten shillings in the pound has, in the opinion of the Court, arisen from circumstances for which the bankrupt *cannot* justly be held responsible."

Without venturing to define the cases or the circumstances in which the Court might hold that a bankrupt could not justly—as distinguished from merely legally—be held responsible, in this case I think that the Court cannot do so. Why? Because here we have the editor of a newspaper deliberately, and in the course of his business, publishing a libel which has been found to have caused damage to another man estimated at £3500. I cannot say, under such circumstances, that the person who published the libel cannot justly be held responsible for consequences which he ought to have known to be likely to arise from what he did.

The difference between this case and *Davitt's Case* (1) is obvious. All that Davitt did was to become a candidate at a Parliamentary election; the acts which led to the litigation which caused his bankruptcy, and his inability to pay, were not his acts at all; some of them were done against his will; he could not escape from the effects of them; he could not be held bound to abandon his

(1) [1894] 1 I. R. 517.

candidature, even if he could have done so. We thought that he could not justly be held responsible for acts of others whom he could not control, and for pecuniary consequences which he could not have anticipated as likely to arise from his becoming a candidate for Parliament. We must assume that "*justly*" in this Act of Parliament has some special meaning other than "lawfully," or "legally," or "by law"; whatever that meaning may be, it seemed to me to be applicable to *Davitt's Case* (1), but I cannot so hold it here.

WALKER, L. J. :—

I concur on the plain meaning of the plain words of the section. The Judge is, by the section, disabled from granting the certificate unless certain conditions exist. None of these conditions exist in this case; in *Davitt's Case* (1) they did. It was the deliberate act of M'Hugh that led to the litigation; it was not so in *Davitt's Case* (1).

HOLMES, L. J. :—

The bankrupt's property having been insufficient to pay a dividend of 10*s.* in the £, the Judge was precluded from granting him a certificate of conformity, unless he was of opinion that the bankruptcy, or the failure to pay the prescribed dividend, arose from circumstances for which the bankrupt cannot justly be held responsible. It is admitted that the cause of the bankruptcy, and of the deficiency in the assets, was a judgment for £3500 obtained in an action for libel published by the bankrupt in a newspaper of which he was the proprietor and editor. It is also admitted that he was personally responsible for this publication; and that it was the result of deliberate intention on his part. The libel has not been read; but I think I am bound to assume from the amount of the verdict, which has not been challenged for excess, that it was of such a character as might be expected to involve the publisher in serious pecuniary liability, and that the bankrupt, as a professional journalist, was well aware of this. With full knowledge of the probable consequences of his act, he takes the risk that one

(1) [1894] 1 I. R. 517.

Appeal. 1903. *In re* M'Hugh. Holmes, L.J.

of those consequences will be to make him insolvent. How can it be said that the insolvency that ensued arose from circumstances for which the bankrupt *cannot* justly be held responsible? There is no meaning that can be reasonably given to these words that would bring the present case within them.

The argument on behalf of the appellant turned upon the comparison of other provisions of the bankruptcy code with the section dealing with certificates of conformity, and as to whether this bankrupt is or is not within those provisions. This seems to me to be immaterial. The bankrupt may or may not be liable to other penalties; but the Court has only to consider on this appeal whether the non-payment of a dividend of 10*s.* deprives him of a certificate of conformity. His counsel, when pressed to say whether the certificate could be withheld in any case where the cause of the bankruptcy was a judgment in an action of tort, was obliged to contend that it must be granted in all such cases, whether the wrong was wilful or not. There is neither reason nor authority for this extravagant proposition.

Davitt's Case (1) in this Court is in strong contrast with the present, and affords a good example of circumstances for which the bankrupt could not justly be held responsible. They arose without his seeking, and were beyond his control; but the tenor of the judgments given therein shows that a certificate cannot be granted where the insolvency is the natural consequence of a deliberate and intentional act of the bankrupt.

Solicitors for the bankrupt: *Thomas Gerrard & Co.*
Solicitors for the assignees: *Bennett Thompson & M'Loughlin.*
Solicitors for W. R. Fenton: *Hamilton & Craig.*

R. D. M.

(1) [1894] 1 I. R. 517.

IN RE WILLIAMSON (1).

Appeal.
1903.
Nov. 11.

Bankruptcy—Certificate of conformity—Failure to pay 10*s. in the* £*—Circumstances for which the bankrupt could not be justly held responsible—Section* 56 *of the Bankruptcy (Ireland) Amendment Act*, 1872 (35 & 36 *Vict. c.* 58)*—Costs of unsuccessful litigant.*

The bankrupt brought an action against the Rover Cycle Co. to recover damages for negligence, in consequence of a bicycle purchased by him from them having broken down, whereby he was injured. He obtained a verdict for £120, which was set aside by the King's Bench, and judgment was entered for the defendants. He appealed to the Court of Appeal, but his appeal was dismissed with costs. He paid to his solicitors £150 on foot of their costs, leaving £251 due to them, for which they issued a writ and recovered judgment. The Rover Cycle Co. taxed their costs in the action at £440. W. presented a petition for arrangement in the Belfast Bankruptcy Court, offering to pay his creditors 1*s.* in the £, but the petition was dismissed, and he was adjudicated bankrupt. He had no assets, and was a clerk in Belfast, earning 30*s.* a week. On the application of the bankrupt for a certificate of conformity:—

Held (affirming the decision of the Recorder of Belfast), that the failure to pay a dividend of 10*s.* in the £ did not arise from circumstances for which the bankrupt should not be justly held responsible.

APPEAL from an order of the Recorder of Belfast, dated the 19th October, 1903, refusing the bankrupt his certificate of conformity. The bankrupt, Walter Williamson, in March, 1897, purchased a bicycle from the Rover Cycle Company for £6. In October, 1897, he went to Leeds on business, and had the bicycle forwarded to him. When riding the bicycle on the 5th April, 1898, near Leeds, the steering post of the machine broke just below the crown plate, the front wheel became detached, and the plaintiff was thrown and severely injured. He brought an action against the Rover Company, which was tried in February, 1899, and resulted in a verdict for £120. This action was brought under the advice of counsel, who advised that he had a good cause of action. On a motion for a new trial, the majority of the

(1) Before FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1903. *In re* WILLIAMSON.

Queen's Bench set aside the verdict, and entered judgment for the defendants. On appeal to the Court of Appeal, the Court upheld the decision of the majority of the Queen's Bench, and dismissed the appeal. See the case reported [1901] 2 I. R., 189, 615. The bankrupt had paid to his solicitors, M'Lean, Son, & M'Kisack, on account of costs, a sum of £150, £50 of which he had borrowed from his brother; his solicitors furnished their costs, showing a balance due of £251 9*s.* 6*d.*, for which they issued a writ in December, 1902. Williamson then presented a petition for arrangement to the Local Bankruptcy Court, Belfast, the offer being 1*s.* in the £. The Rover Cycle Company taxed their bill of costs to £440. The only creditors were M'Lean, Son, & M'Kisack, the Rover Cycle Company, and the bankrupt's brother for £50, money lent, all of which liabilities were incurred in the action. The first two creditors voted against the arrangement, and the case was turned into bankruptcy.

The bankrupt was twenty-seven, and was earning 30*s.* a week as a clerk: he had no assets.

On the 19th October, 1903, the Recorder of Belfast refused the bankrupt his certificate of conformity, and the bankrupt appealed.

Serjeant Dodd, *O'Brien*, *K. C.*, and *M'Gonigal*, for the appellant:—

The bankrupt was advised that he had a good cause of action, and it is too much to expect that he had present to his mind the consequences which have ensued. This case comes within the decision of *Re Davitt* (1): there is no difference between bringing an action and defending one.

Hume, *K.C.*, and *Hanna*, for the assignees; and

D. M. Wilson, for M'Lean, Son, & M'Kisack, were not called upon.

FITZ GIBBON, L. J.:—

We have had to consider this section (Bankruptcy (Ireland) Act, 1872, sect. 56. i.) so recently in *M'Hugh's Case* (2) that it is unnecessary to reserve judgment.

(1) [1894] 1 I. R. 517. (2) *Ante*, p. 118.

We start with the fact that the legislation is positive. The Court is expressly forbidden to grant the certificate unless it is proved that a defined condition has been fulfilled. The condition is, "that his bankruptcy or the failure to pay ten shillings in the pound has, in the opinion of the Court, arisen from circumstances for which the bankrupt cannot justly be held responsible."

There is no sense of the words "justly responsible" in which they *may* not apply to every consequence of a man's own act; but in this provision there *must* be some limit, because it postulates cases in which the bankrupt can not *justly* be held responsible, though he is legally responsible, and has even been made bankrupt by reason of that responsibility. If the consequences could not reasonably have been anticipated, a different question would arise, but in this case the consequences were the direct result of the bankrupt's own act in launching a costly action, involving great expense to the defendants, which he had no means of paying if he failed. It is impossible to lay down any general rule, but where the loss inflicted by the bankrupt is large, and is the direct and necessary consequence of his action, I fail to see how he can fail to be justly responsible. Any "opinion of the Court" must be based on judicial grounds, and I can find none for holding that a man who brings an action with the necessary consequence of entailing on the defendant a large amount of costs, which the plaintiff—if he fails—cannot pay, "cannot justly be held responsible" for his inability to pay when his action is proved to be unfounded, and the costs of it have become a judgment debt of his. It cannot be enough to exonerate him that he expected the action to succeed, for the judgment against him established that the expectation was unfounded, and that the responsibility for the costs justly fell on the plaintiff.

This case is stronger against granting the certificate than was *M'Hugh's Case* (1), not because here the bankrupt was a plaintiff, and M'Hugh was a defendant, but because the consequences in *M'Hugh's Case* (1) were more contingent and less direct than here. The plaintiff's action could not be defended without great expense, and this expense justly fell on him when his action failed. The

(1) *Ante*, p. 118.

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document which M'Hugh published might, or might not, have had an action brought upon it; its publication might, or might not, have caused the special damage which resulted from it. It produced an amount of loss, larger possibly than the bankrupt expected, but he was held justly responsible for the damages and costs. Here the costs, of which the bankrupt cannot pay 10*s.* in the pound, arose directly and inevitably from the circumstance that he brought the action, and from no other cause whatsoever.

As regards the reasonableness of bringing the action, though I do not think that is the issue now, it is to be observed that all the Judges who considered the case, with the single exception of the Chief Baron, held that there was no evidence of the alleged breach of warranty, and the Chief Baron's opinion to the contrary was founded entirely on the view which he took of the non-production by the defendants of the broken part of the bicycle, to which he applied the presumption against a spoliator, but the Court of Appeal dissented from that view. We cannot lay down—what would undoubtedly be the result of a decision in favor of the appellant—that a person who brings an unfounded action without any means of paying the costs to which he is inevitably putting other people "cannot justly be held responsible" for his failure to pay 10*s.* in the pound, when he is called upon to bear the consequences of his having started the litigation.

I am of opinion that the decision of the Recorder of Belfast is right.

WALKER and HOLMES, L.JJ., concurred.

Solicitor for the bankrupt: *D. M'Gonigal.*
Solicitors for the assignees: *Carson & M'Dowell.*
Solicitors for the creditors: *M'Lean, Sons, & M'Kisack.*

R. D. M.

BOUCHER *v.* THE CLYDE SHIPPING CO. (1).

(1902. No. 1847.)

K. B. Div.
1903.
May 6, 8, 17.

Collision—Claim for damages for personal injuries—Pilot—Regulations for preventing collisions at sea—Articles 10–21*—Both ships in fault—Division of loss—Merchant Shipping Act*, 1894, *sect.* 419, *sub-sect.* 4*—Judicature Act* (*Ireland*), 1877, *sect.* 28, *sub-sect.* 9.

The plaintiff sustained personal injuries in a collision at sea that occurred between a schooner in his charge as pilot, and the defendants' steamer. In an action *in personam* against the defendants, claiming damages in respect of such injuries, caused, as alleged, by the negligence of the defendants, the jury (*inter alia*) found that the defendants were negligent in not getting out of the way of the schooner, or stopping; and assessed the plaintiff's damages at £500. It was admitted that the schooner, which was being overtaken by the steamer, displayed no stern light, as required by article 10 of the statutory regulations.

On a motion to set aside the verdict and judgment entered for the plaintiff for £500 at the trial :—

Held, that the Merchant Shipping Act, 1894, c. 60, sect. 419, sub-sect. 4, is not confined to Admiralty cases, but applies to all Courts; that the schooner was in fault in respect of the said breach of the collision regulations; and, *per* Andrews and Gibson, JJ. (Boyd, J., dissenting), that the Admiralty rule as to division of loss applied; and that the plaintiff was only entitled to half the damages assessed by the jury.

NEW TRIAL MOTION.

The action, which was tried before the Lord Chief Baron and a special jury of the city of Dublin during the Hilary Sittings, 1903, was brought by the plaintiff to recover damages for personal injuries sustained (as alleged) through the negligence of the defendants or their servants. The plaintiff was a certified pilot of the city of Waterford, and the defendants were the owners of the steamship *Pladda*. On October 4, 1901, about 8.30 p.m., a collision occurred in Waterford Harbour between the *Pladda*, of 510 tons register, proceeding to Waterford with a general cargo, and the schooner *Cintra*, of 162 tons register, proceed-

(1) Before ANDREWS, GIBSON, and BOYD, JJ.

K. B. Div. 1903.

BOUCHER v. CLYDE SHIPPING CO.

ing to New Ross with a cargo of coal. As a result of the collision, the *Cintra* which was in the charge of the plaintiff as pilot, foundered and sank, and the injuries complained of in this action were sustained by the plaintiff in escaping from the sinking vessel into a punt alongside. Shortly before the collision, and after the lights of the *Pladda* which was approaching and overtaking the *Cintra* had become visible to those on board the *Cintra*, the latter vessel, which was making towards the weir on the Waterford side of the harbour, on the starboard tack, came round on the port tack without finishing her course. There was some conflict of evidence as to the exact place where the *Cintra* went about, the change of course being (the plaintiff alleged) necessary by reason of the proximity of shallow water. It was admitted that the *Cintra* displayed no stern light as required by article 10 of the Regulations for Preventing Collisions at Sea, of November, 1896 (1).

The plaintiff by his statement of claim alleged that those on board the *Pladda* wrongfully and improperly neglected to keep a good look out; that the *Cintra* being a sailing vessel, the *Pladda* wrongfully neglected to keep out of the *Cintra's* way; that the *Pladda* at the time of the collision was on her wrong side of the river, and was proceeding at an excessive rate of speed; and that the collision and the injuries of the plaintiff were caused by the negligence of the *Pladda*, the defendants, their servants and agents.

The defendants by their defence denied negligence on their part, pleaded contributory negligence, and charged that the plaintiff, being in charge of the *Cintra*, negligently and wrongfully navigated her in an unskilful and unseamanlike manner, and failed to keep the *Cintra* on her course when the *Pladda* was overtaking her, and did not exhibit to the *Pladda* any proper stern light or flare-up light, or give the *Pladda* any warning of the position of the *Cintra*.

The following were the questions left to the jury, the answers to which are appended :—

(1) Art. 10. A vessel which is being overtaken by another shall show from her stern to such last-mentioned vessel a white light, or a flare-up light.

1. Was the defendants' steamer out of its course, and was being so out of its course negligence which caused the accident? *Answer*—Defendants' steamer was not sufficiently out of its course to cause the accident.

2. Was the plaintiff guilty of negligence in respect of the following matters—(*a.*) In not having shown any stern light or flare-up light? *Answer*—We consider that the plaintiff should have exhibited a stern or flare-up light when the schooner was in stays. (*b.*) In having (as alleged) gone about in the fair way before she had finished her tack. *Answer—No.* (*c.*) In not having a look out? *Answer*—No. (*d.*) And if so, did such negligence contribute to the injuries complained of? *Answer*—No.

3. Were the *Pladda* and the *Cintra* proceeding in such directions as to involve risk of collision. *Answer*—No, if proper precautions had been taken.

4. Did the defendants take due care to keep out of the way of the *Cintra*? *Answer*—No.

5. Could the defendants by either getting out of the way of the *Cintra* or by stopping before the collision have avoided the consequence of the plaintiff's negligence and the injuries complained of, and if so, were they (defendants) negligent by not getting out of the way or stopping? *Answer*—Defendants were negligent in not getting out of the way or stopping.

6. If so, assess the plaintiff's damages? *Answer*—Damages £500.

Upon these findings the learned Judge entered judgment for the plaintiff for £500 and costs; and the defendants now moved that the verdict and judgment so had at the trial should be set aside, and that judgment should be entered for the defendants, or for a new trial.

Hume, K.C., Chambers, K.C., and *Boyd*, for the defendants:—

1. [They contended that the answers of the jury to questions 2, *b*, *c*, and *d*, and 3, 4, and 5, were against the weight of evidence, and that the *Cintra* was alone to blame for the collision by reason of her having stayed where she did.]

2. Under the Merchant Shipping Act, 1894, sect. 419, sub-

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sect. 4 (1), the *Cintra* must be deemed to have been in fault owing to her breach of articles 10 and 21 of the Regulations for Preventing Collisions at Sea, 27th November, 1896 (2). It cannot be contended that departure from the regulations was necessary, or that the breaches thereof could not possibly have contributed to the collision. The principle laid down in *Tuff* v. *Warman* (3) no longer applies: Merchant Shipping Act of 1873, sect. 17. The true construction of that section is determined in *The Fanny M. Carvill* (4), followed in *The Duke of Buccleuch* (5). The regulations must be strictly followed; necessity alone excuses their non-performance: *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Company* (6). The Merchant Shipping Acts are not limited to Admiralty cases, and their provisions must be given effect to in every Court. Consequently, the *Cintra* being in fault, the plaintiff can recover nothing, as the Admiralty rule as to division of loss does not apply to cases of personal injuries; if, on the other hand, that rule does apply, the plaintiff can only recover half the damages assessed by the jury.

Serjeant Dodd and *Rice*, for the plaintiff:—

Section 419 of the Act of 1894 relates only to a matter between ship and ship, and not as between man and ship. "Deemed to be in fault" is a technical phrase in Admiralty, and has no application to an ordinary common law action founded upon negligence, such as the present. It is submitted that the plaintiff's case comes within the principle of *Tuff* v. *Warman* (3) and *Davies* v. *Mann* (7), and that sect. 419 being inapplicable, the plaintiff is entitled to the full amount of the damages assessed by the jury, if entitled at all.

2. There is no finding that the *Cintra* infringed any of the

(1) Where, in the case of a collision, it is proved to the Court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary.

(2) Art. 21. Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed.

(3) 5 C. B. (N. S.) 573.

(4) 2 Asp. Mar. Law. Cas. 565.

(5) 15 P. D. 86.

(6) 7 A. C. 795.

(7) 10 M. & W. 546.

regulations. This Court cannot draw inferences of fact to that effect, it not being the Court "before whom the case is tried." The plaintiff is, at the worst, entitled to half damages.

Boyd, in reply.

[The following cases were also referred to during the argument:—*The Englishman* (1); *The Lapwing* (2); *The Main* (3); *The Voorwaarts and The Khedive* (4); *The Benares* (5); *The Memnon* (6); *The Vera Cruz* (7); *The Bernina* (8); *Thorogood* v. *Bryan* (9); *The Bushire* (10).]

Cur. adv. vult.

May 17.

GIBSON, J.:—

The learned Judge at the trial acted on *Tuff* v. *Warman* (11). If that case applies, the verdict must stand, as there was evidence to support the finding that the proximate cause of the collision was the negligent navigation of the *Pladda*. The question with which I propose to deal is the effect of the Merchant Shipping Act, 1894, and whether the infringement of statutory regulations by the plaintiff is a defence to the action.

Two articles of the code are said to have been violated—article 10, as to stern lights, and article 21, that the sailing vessel should keep her course and speed. As to the alleged infringement of this latter article, I express no opinion. The duty of maintaining course and speed depends on reasonable possibility of doing so, the proximity of land, the wind, etc. The evidence was contradictory, and the place where the *Cintra* went about, and the reason of doing so, were in controversy, and were not found by the jury.

I turn to article 10, the operation of which is explained in *The Main* (3). The obligation to show the stern light arose if and when the *Cintra* saw the *Pladda* approaching and overtaking her on a course likely to lead to a position of danger. It was the duty of the *Cintra*, on the evidence, to exhibit a stern light, at least when she went about. So the jury have found;

(1) 3 P. D. 18.
(2) 7 A. C. 512.
(3) 11 P. D. 132.
(4) 5 A. C. 876.
(5) 9 P. D. 16.
(6) 59 L. T. (N. S.) 289.
(7) 9 P. D. 88; 10 A. C. 59.
(8) 11 P. D. 31.
(9) 8 C. B. 115.
(10) 52 L. T. (N. S.) 740.
(11) 5 C. B. (N. S.) 573.

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and though the omission to show such light may not have been the direct cause of the subsequent collision, it tended to embarrass the navigation of the steamer: *The Ovingdean Grange* (1). It is impossible to say that the violation of the article could not by possibility have affected the result. Whether it *would* have done so can only be matter of speculation. I think the risk of collision taking place was increased by the omission.

On the assumption that article 10 was infringed, what is the operation of the statute of 1894, chap. 60, sect. 419, sub-sect. 4? In cases which come within it, the construction of this enactment has been settled by a series of conclusive authorities from *The Khedive* (2), to *The Duke of Buccleuch* (3), which, decided on the corresponding provision in the Act of 1873, sect. 17, must be taken to have been recognised and ratified by the Legislature. In a case of collision the infringing vessel is conclusively deemed in fault, whether the breach of the regulation caused or contributed to the accident or not, unless it can be shown that departure from the regulation was necessary, or that the infringement *could* not possibly have contributed to the collision. Where these two exceptions do not apply, the collision is, by irrebuttable presumption, attributed to the fault of the infringing vessel, and the principle of *Tuff* v. *Warman* (4) is excluded. The regulations are mandatory; and the Legislature, in order to avoid the danger of conflicting evidence, and to ensure obedience to the regulations made for the safety of our marine, has withdrawn all discretion, and imposed an absolute duty of obedience, breach of which fixes the offending vessel with the responsibility of having actually caused the collision, notwithstanding that the proximate and direct cause was in truth and fact the careless navigation of the other vessel. Where the collision is caused partly by infringement of the regulations—by statutory presumption deemed an efficient cause—on the part of one vessel, and partly by negligent navigation of the other, both are regarded as equally to blame, and no distinction is drawn by the law between the degrees of culpability: *The Khedive* (5); *The Beryl* (6).

(1) [1902] P. 208.
(2) 5 A. C. 876.
(3) [1891] A. C. 310.
(4) 5 C. B. (N. S.) 573.
(5) 7 A. C. at p. 818. [Esher.
(6) 9 P. D. at pp. 144, 145, *per* Lord

Section 298 of the Act of 1854 provided that in any case of collision occasioned by the non-observance of any rule, the owner of the infringing ship should not be entitled to recover any recompense for any damage sustained by such ship.

The present section, following the Act of 1862, sect. 29, and the Act of 1873, sect. 17, alters the above 298th section in the following particulars:—(1) it eliminates the necessity of proving causal connection between the infringement and the collision; (2) it makes the ship to blame and does not merely punish the owner by forfeiture of all right to damages; (3) it is silent as to consequent liability for damage, with the result that damage is not restricted, and that the offending owner who (under sect. 298) could get nothing, is now, under sect. 419, sub-sect. 4, entitled to the benefit of the Admiralty rule dividing the loss between the delinquent vessels. Under the 298th section of the Act of 1854 the infringing owner had no right of action at Common Law, as before the section can apply the breach must be shown to have occasioned the collision; and he had no redress in Admiralty by the express language of the section.

Plaintiff's counsel contend that (1) sect. 419, sub-sect. 4, is limited to Admiralty causes of collision between ship and ship, and does not affect the right to maintain personal actions at Common Law; (2) that the claim relates to a matter within Admiralty jurisdiction proper, and that at least half damages can be awarded, both vessels being in fault.

1. The object of the Legislature was to secure safety of life as well as of property by preventing collisions. Infringement caused by wilful default is made a misdemeanour (sect. 419, sub-sect. 2); a duty is imposed by sect. 422 to assist the injured vessel; and sect. 503 enables liability to be limited for loss of life, property, or personal injuries. "A case of collision" means "every" or "any" case of collision: it does not refer to any particular form of judicial proceeding or jurisdiction. The section must receive effect in every Court. An infringing owner cannot by suing at Common Law avoid the blame imputed to his vessel, and rely on *Tuff* v. *Warman* (1), which Parliament clearly

(1) 5 C. B. (N. S.) 573.

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intended should in future be inapplicable. The conclusive presumption of fault causing the accident arises in every proceeding where the cause of the collision has to be decided. It is quite plain that sub-section 4 cannot be confined to Admiralty cases proper. Collision actions were of frequent occurrence in Courts of Law: Maclachlan on Shipping, 316; *Tuff* v. *Warman* (1); *Dowell's Case* (2); though no doubt Admiralty was more frequently resorted to—partly on account of there being a specific remedy *in rem* against the wrong-doing ship, partly because of the doctrine of maritime lien, which conferred on claims *ex delicto* precedence over prior contractual liens: *The Veritas* (3); *The Elin* (4); and not least on account of the Admiralty rule apportioning damage in the case of joint fault. At Common Law anyone contributing to the collision by his own fault got nothing.

What is the meaning of the phrase "the ship shall be deemed to be in fault"? The ship is of itself inert and inanimate: it can be guilty of no delinquency, and cannot obey or disregard regulations as to lights, course, or speed. The fault must be the fault of the owner and persons in charge who infringe the regulations. "The ship" is a compendious description including the owner and persons responsible. Suppose there were statutory rules as to motor cars, and a provision that a motor car violating such rules should be deemed in fault, the statutory blame and responsibility obviously would attach to the master and chauffeur. The ship in fault may be proceeded against *in rem* or the owners may be sued personally either in the Admiralty or at Common Law. Where the collision results from the joint fault of the two vessels, each vessel and its owners are liable to persons thereby injured in person or property. Passengers are not identified with the wrong-doing of the ship carrying them; and notwithstanding *The Milan* (5) and *The Chartered Mercantile Bank of India* v. *Netherlands India S. N. Company, Limited* (6) (the law laid down in which is still reproduced in some text-books), I do not see why the same principle should not

(1) 5 C. B. (N. S.) 573.
(2) 5 E. & B. 195.
(3) [1901] P. at pp. 313, 314.
(4) 8 P. D. 129.
(5) 1 Lushington, 388.
(6) 10 Q. B. D. 521.

extend to cargo-owners, or why they should be restricted to half the loss against each delinquent vessel (see *The Avon* (1); *The Englishman* (2)). But the owner and responsible officer of the ship in fault are identified with the ship; it is by their infringement that the blame has been incurred (*The Vera Cruz* (3)); such owner, if he owned the cargo, could not claim to be compensated for the loss of his cargo on the basis that the ship, and not he, was in fault.

That an officer in charge who by his disregard of statutory regulations has put his vessel in fault, and thereby exposed his owner to the loss of half his property, should notwithstanding be able to claim compensation for the entire loss sustained by himself in property or otherwise—he might own part of the cargo—would seem absurd; and the absurdity would be the greater in a case of a compulsory pilot, as his owner would be entitled to recover a moiety of his own damage without liability or deduction for the damage sustained by the other delinquent vessel, which would be without redress (*The Hector* (4)).

The expression "in fault" is not, as counsel for the plaintiff suggested, appropriated to Admiralty proceedings. It is of constant occurrence in cases relating to Common Law, as well as in Admiralty suits. It merely imports that the vessel is blamable as having caused the collision (*Hay* v. *Le Neve* (5); Maude and Pollock, 3rd Ed., pp. 466, 469, 470; *The Woodrop Sims* (6)). In case of collision the vessel "in fault" could not, having itself directly contributed to the collision, recover any damage from the other vessel on Common Law principles. In Admiralty, by a venerable but arbitrary rule (*De Vaux* v. *Salvador* (7)), in the case of collision arising from the common fault of the two vessels, the damage was divided (see *The Khedive* (8), *The Lapwing* (9), being both cases of infringement of the statutory regulations).

2. This brings me to a question of great difficulty. Assuming

(1) [1891] P. 7.
(2) [1894] P. at p. 244.
(3) 9 P. D. at p. 95; *ib.* at p. 101, *per* Bowen, L.J.
(4) 8 P. D. 218.
(5) 2 Shaw Sc. App. 395.
(6) 2 Dods. Ad. 85.
(7) 4 A. & E. at p. 432.
(8) 7 A. C. 795.
(9) *Ibid.* 512.

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that the pilot, who is the cause of the ship being in fault, is blamable in the same way as if the infringement was the actual cause, or one of the causes, of the collision, and that he could claim, on the marine rule, half his property loss from the *Pladda*, has he the same rights as to his personal injuries? For this purpose I shall assume that he is in the same position as if his injuries were the direct result of the blow of the collision, as what befell him was the natural consequence of the *Cintra* being sunk (*The George and Richard* (1)).

In an action under Lord Campbell's Act there was no jurisdiction in Admiralty, and if the plaintiff had lost his life, the fact that by his violation of the statutory rules he had imposed on the *Cintra* blame for the collision would have been a complete answer to any claim by his representatives for compensation at Common Law.

Claims for personal injuries short of loss of life may, however, stand in a different position; and it may be argued that if loss from damage to property can in Admiralty be recovered either *in rem* or personally to the extent of one-half where the collision is caused by common fault, damage from personal injury is equally recoverable. Under 30 & 31 Vict. c. 114, s. 29, the Court of Admiralty has jurisdiction over any claims for "damage received or done by any ship." Whether the word "damage" embraces personal injuries has been the subject of conflicting decisions on the analogous English legislation. In Bruce's Admiralty Practice, p. 97, claims for such injuries are stated to come within Admiralty jurisdiction. In several cases the Court of Admiralty gave relief both *in rem* and *in personam* in respect of such injuries, and the Privy Council in *The Beta* (2) followed this view. The Queen's Bench disagreed with this opinion in *Smith* v. *Brown* (3), Lord Blackburn doubting. In *The Franconia* (4), an action under Lord Campbell's Act, the Court of Appeal was equally divided, but the dissentient Judges, Bramwell and Brett, L.JJ., expressly declined to give any opinion as to jurisdiction where the suit was for ordinary personal injuries not causing death. In *The Vera*

(1) L. R. 3 A. & E. 466.
(2) L. R. 2 P. C. 447.
(3) L. R. 6 Q. B. 729.
(4) L. R. 2 P. D. 163.

Cruz (1), it was finally decided that there was no jurisdiction in Admiralty to entertain claims for loss of life; but Brett, M.R., in the Court of Appeal (2) thought that damage need not be confined to damage to property, and Lord Blackburn (at p. 72) declined to offer any opinion as to jurisdiction in the case of personal injuries. In *The Zeta* (3), after an elaborate and interesting analysis of all the authorities by Mr. Carver in his argument, Lord Herschell, at p. 478, says: "It is enough to say that the proposition that the Act of 1861, applies to damage done by a ship to persons and things other than ships has been well established by many authorities, the correctness of which I see no reason to doubt." At p. 485, he remarks: "It is impossible to maintain the proposition that damage was, according to the well-understood meaning of the phrase in the Admiralty Court, confined to damage due to collision between two ships" (see *The Port Victoria* (4)). Lord Macnaghten seems to have entertained the same opinion, agreeing with the dissentient judgment of Fry, L.J., below. *The Englishman* (5) is to the like effect.

On the above authorities I think this Court ought to hold (though the matter is doubtful) that a claim for personal injuries caused by a collision could be maintained in the Court of Admiralty *in rem* as well as *in personam*.

Supposing that a claim for personal injuries would be "damage" which would fall within Admiralty jurisdiction proper, does the Admiralty rule as to division of loss apply to such injuries? In *The Vera Cruz* (6)—a proceeding *in rem*—reversed on another ground, it was held that the rule applied, and the law is so stated in the last edition of Bruce's Admiralty Practice, p. 97. The passages quoted from the judgments in *The Bernina* (7) as to Owen, the officer's claim looks the other way; but the learned Judges were dealing with the case as altogether outside Admiralty jurisdiction, and governed entirely by Common Law. Their attention was not directed to the Admiralty rule as to division of damage, and their remarks at most would be *dicta*.

(1) 10 A. C. 59.
(2) 9 P. D. at p. 99.
(3) [1893] A. C. 468.
(4) [1902] P. 25.
(5) [1894] P. at p. 243.
(6) 9 P. D. at p. 97.
(7) 12 P. D. 82.

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If an action for personal injuries would come within Admiralty jurisdiction, a remedy *in rem* founded on maritime lien (*The Bold Buccleuch* (1); *The Veritas* (2)) could be awarded. The rule as to division of loss is not restricted to suits *in rem*: it is general. The "res" might prove of insufficient value, and the obligation to bear half the loss is imposed on the respective owners personally (*The Khedive* (3) and other cases). Any damage in excess of the value of the "res" was recoverable in Admiralty against the owners who appeared personally (*The Gemma* (4)). If, in an Admiralty suit *in personam*, loss on goods can be apportioned, why, in principle, should not the same rule apply to all loss cognizable in Admiralty, whether the form of the proceeding is *in rem*, when the value of the "res" limits the relief in certain cases (*The Gemma* (4)), or *in personam*, when statutory limitation of liability may be also invoked?

The last point is whether the provision in the Judicature Act extends the Admiralty rule as to division of loss in case of common fault to an action like the present. The rules of Admiralty and Common Law are, in case where both vessels are to blame, at variance, and the only question is whether the action is "a cause or proceeding for damage arising out of a collision between two ships." I think these words extend to this case. If in a collision a man were injured by the bowsprit of the other vessel, this would be damage done by a ship within the jurisdiction of Admiralty (*The Vera Cruz* (5)), and would be damage arising out of a collision.

The case is a doubtful one, particularly as to Admiralty jurisdiction and the division of loss in the case of personal injuries; but the inclination of modern authority favours the view that the plaintiff is entitled to half his damage, and I so decide. My brother Andrews concurs in this judgment.

BOYD, J.;—

It is necessary in this case to consider, in the first instance, whether the evidence shows that the *Cintra* alone was guilty of negligence or default in the occurrence which happened:

(1) 7 Moore P. C. C. 267.
(2) [1901] P. D. 313.
(3) 7 A. C. 795.
(4) [1899] P 285.
(5) 9 P. D. at p. 99.

whether the *Pladda* was alone in fault or whether both vessels should be held liable. On a careful review of the evidence, I am of opinion, that the story of the navigation of the *Cintra* and of the position of that vessel at the time of the collision, as detailed by the witnesses examined on her behalf, cannot be true. Each of the witnesses places the vessel in a different position at the time of the collision, and it is manifest to me that their effort was to place her in such positions for the purpose of trying to excuse her for the defaults for which she was undoubtedly guilty. Some of them place her close to, and even between, the weirs at Cheek Point, and others at a considerable distance therefrom.

I will first refer to the direction of the wind. It was from the N.W., and the tide was flowing. The *Cintra* was beating up the river. From about a mile below Cheek Point the river turns to the east of north, and flows about NN.E. With the wind from the quarter I have mentioned, the *Cintra*, in my opinion, could easily have sailed from below Cheek Point without a tack, straight up to the Wexford coast, opposite to Cheek Point. Having arrived at the end of her tack on that course, she should go about on to the starboard tack, and on that tack her course would be W. by S., or thereabouts, as she should be able to sail within five or six points of the wind, more especially as she had the flood tide under her lee, helping her up to windward. Her object was to get to the anchorage at the south end of the river Barrow, at the place marked on the charts given in evidence. The course of the river from Cheek Point turns sharp to the west, and, therefore, in my opinion, she would have gone altogether out of her course to get into any position near the weirs. Her course, if kept by her, would have taken her up mid-stream, if not more to the north of that. She was a vessel of 62 tons register, and had a cargo of probably 100 tons of coal on board. She was struck by the *Pladda* about mid-ships, and after the collision was pushed by the *Pladda* to a position marked on the charts, well over on the north side of the river, and north of the line of the two leading lights up the Waterford river. In my opinion it would have been utterly impossible for the *Pladda* to have pushed a vessel such as the *Cintra* fully laden across the entire river in the time mentioned. Patrick Whitty gives the

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distance as three-quarters of a mile from the place of collision to the position in which the *Cintra* sank. According to Nicholas Cullen, the distance was about a quarter of a mile. I think the latter distance the more probable, and if it be correct the *Cintra*, at the time of the collision, must have been well over on the north side of the river.

It is admitted by John Kearon, the master and part owner of the *Cintra*, that when he first saw the *Pladda* she was steering the proper course, and I fail to see why she should so far alter that course as to get into the position at which most of the witnesses for the *Cintra* place her at the time of the collision, as her course necessitated her getting to the north side of the river, so as to see the leading lights. I am, therefore, on the evidence, constrained to hold that the collision must have occurred well over to the north side of the channel. If I am correct in this, the stern light, if it had been exhibited on the *Cintra* must have been visible to the *Pladda* and there was no excuse for the omission to exhibit it. I think it was for the purpose of excusing this omission that the position of the *Cintra* has been wrongly stated by her witnesses. There was nothing under any circumstances to excuse this violation of the Sailing Regulations. I cannot account for the lowering of the sails on the *Cintra* before and at the time she stayed, except on the grounds that she was near the berth in which she intended to anchor, and, therefore, the crew were getting her ready for so doing. Why otherwise would they have had the anchor over the bow, and the crew be looking after the anchor-chain? Why was the flying jib lowered before she was stayed? and why was the foresail lowered, and the peak of the mainsail scandalised, and the tack hauled up after she was stayed? If the case of the *Cintra* be correct, there was no reason why these measures should have been resorted to, as at the time they had no reason to apprehend a collision as they had lost sight of the *Pladda*, she being, as they state, hidden by Cheek Point, and when last seen there was no allegation that she was not in her proper course. It is also to be noticed that the *Cintra's* mate, James Brennan, also swore that "it was on account of the steamer coming up that we stayed and did not cross when we passed Cheek Point. We

shut out steamer's lights before we stayed." I am of opinion all this evidence strongly corroborates the case made by the *Pladda*, and shows that the *Cintra* was stayed on to the port tack, not because she had finished the course on the starboard tack on which she might and should have continued, and that it was not her proximity to the Waterford shore which caused her to alter her course on to the port tack. She had no right so to alter her course, and more especially as she had no stern light, which would have indicated to the steamer what she was doing. Had she continued her course on the starboard tack she would have gone clear of the steamer. Assuming that she was crossing the steamer on the starboard tack, she could not have altered her course on to the port tack without turning her stern towards the steamer, and she would then have exhibited her stern light to the steamer had it been there. Having got across the steamer's bow she would have shut in her port light, and it would have become invisible when she brought the steamer two points abaft the beam, and the only light which could have told the steamer that she was in stays would have been the stern light.

I am, therefore, of opinion that she violated the sailing rules, both by not keeping her course and by not exhibiting her stern light; and I think the steamer was misled by her omission, and was prevented from taking precautions in time to avoid the collision, and to keep out of the way of the *Cintra* and that the *Cintra* was wholly to blame.

I have not gone into more detail as to the contradictory character of the evidence of the several witnesses for the *Cintra*, because I consider it unnecessary to do so; but it abounds in contradictions on many material points.

I do not think there is any satisfactory evidence that the speed at which the *Pladda* was proceeding was excessive at the time of the collision. The witnesses for the plaintiff state their opinion of what they *thought* was the speed of the *Pladda*, but none of them give any valid grounds for their opinion. On behalf of the *Pladda*, it is proved beyond doubt that at Cheek Point her speed was, as was usual and proper, reduced to half speed, and that before the collision her engines were reversed and turned full speed astern. She is corroborated in this, I think,

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by the force with which she struck the *Cintra* not having been more violent than it was. A large and heavy steamer like the *Pladda*, if going at much less than half speed, striking a vessel of the class of the *Cintra*, would have gone right through her. The chief engineer of the *Pladda*, Mr. Allen, states that in the engine-room he did not feel any shock whatever. Even had I been of opinion that the *Pladda* was also in fault for the collision taking place, I am of opinion that the plaintiff is not entitled to recover any damages, owing to his violation of the sailing regulations to which I have referred. The plaintiff was the person who was responsible for the navigation and management of the *Cintra*, and it was his duty to see that the collision regulations were not infringed on board of her.

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), it is enacted (sect. 418, sub-sect. 1), collision regulations thereby provided for "shall have effect as if enacted in this Act," and sub-sect. 2, that foreign ships shall observe the same, and be treated as if they were British ships. This Act is a public and general Act, and its provisions apply to all the Courts, and to all persons affected by it.

Section 419, sub-sect. 4, provides that "Where, in a case of collision, it is proved to the Court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary." Prior to the passing of this Act the statute which made provision for observance of the sailing regulations was of a much less drastic character. By the Act previously in force (25 & 26 Vict. c. 63, sect. 29) it was enacted that "If, in any case of collision, it appears to the Court before which the case is tried, *that such collision was occasioned by* the non-observance of any regulation made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the regulation necessary."

In the present Act the mere non-observance of the regulations causes the offending vessel to be deemed in fault; whereas, by the

previous Act it was necessary that it should be proved that the non-observance occasioned the collision.

On the admitted and proved facts of this case, and it is so found by the jury, the regulations were not observed on board of the *Cintra*, and it was not and could not have been proved that a departure from the rule was necessary. What, therefore, is the consequence to the plaintiff of such non-observance?

It is contended on behalf of the plaintiff that he is at least entitled to half damages, under the practice prevailing in the Admiralty Court, whenever it is found that both vessels are in fault, that the damages should be divided. I do not concur in this contention. I think the rule acted upon in the Admiralty only applies to division of damages arising to ships or cargoes, and does not apply to actions for personal injuries, more especially personal injuries happening to a party who was responsible for the collision. In *The Bernina* (1), at p. 85, Lindley, C.J., states, as to one of the parties to the action which was taken by the representatives of one Owen, who was the second officer on board:—"Now, as regards one of them, Owen, the second officer, who was himself to blame for the collision, it is clear that if death had not ensued he could not have maintained an action against the defendants. There was negligence on his part contributing to the collision, and no evidence to show that, notwithstanding his negligence, the defendants could, by taking reasonable care, have avoided the collision. There was what is called such contributory negligence on his part as to render an action by him unsustainable." Lord Esher, at p. 84, says:—"In the case of Owen, the deceased was personally negligent, so as that his negligence was partly directly a cause of the injury. He could not have recovered, neither can his administratrix." And Lopes, L.J., at p. 96, says:—"Owen clearly cannot, because he was himself to blame." This case was taken to the House of Lords (2), and Lord Herschell, in his judgment, does not express any dissent from these observations of the Judges of the Court of Appeal. In *The Vera Cruz* (3) the question arose as to the cases in which the Court of Admiralty had jurisdiction, and Brett, M.R., in giving judgment states, at p. 99:—"But the section does not apply to a case when physical

(1) 12 P. D. 82. (2) 13 A. C. 1. (3) 9 P. D. 96.

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damage is not done by a ship." In the present case the physical injury was not "done by a ship," but was the result of an act done by the plaintiff himself, though it may have been done under a reasonable apprehension of danger.

By section 9 of the Judicature Act, 1877, the Judge of the Court of Admiralty retains the same jurisdiction as that which he formerly possessed, and by sect. 28, sub-sect. 9, of that Act, it is enacted that "in any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the High Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail." If the decision in *The Vera Cruz* (1) be correct, there was, in such a case as the present, no rule at variance with the Common Law rule, and, therefore, the rules of Common Law, and not those of the Admiralty apply. According to the Common Law rules the plaintiff cannot succeed, and I am, therefore, of opinion that judgment should be entered for the defendants.

Counsel having been heard on the question of costs, the following order was made by the Court:—

"IT appearing to the Court that the plaintiff and the defendants, and their respective ships were both in fault; that the collision causing the damage complained of by the plaintiff was the result of such joint fault; that the action was one within the jurisdiction of the Court of Admiralty, and that the damage sustained by the plaintiff should be equally divided between the parties respectively to blame, the Court doth order that judgment for the plaintiff be reduced to half the damages awarded, namely, the sum of £250, and be entered for that sum; and it appearing that, according to the rule in force in the Court of Admiralty, where both ships were found in fault no costs are given, and that the said rule should be applied to an Admiralty action brought in the King's Bench Division, and tried by a jury, the Court doth further order that the plaintiff, for the special cause aforesaid, do have no costs of this action up to and including the trial thereof, and doth direct that the plaintiff and defendants respectively do abide their own costs of the argument in this Court.

Solicitors for the plaintiff: *I. Thornton & Son.*
Solicitors for the defendants: *Hayes & Son.*

R. ST. J. C.

(1) 9 P. D. 96.

WILSON *v.* BOYLE (1).

(1903. No. 1164.)

K. B. Div. 1903.
June 23, 24, 29.
Appeal.
Dec. 10, 11, 15.

Landlord and tenant—Land Law (Ireland) Act, 1887, sect. 8—Surrender by middleman—Reduction of rent—Time for serving notice of surrender.

Defendant was tenant to the plaintiff under a sub-grant in perpetuity, dated the 2nd July, 1873, of lands in the county of Armagh, containing 45A. 3R. 1P. at the rent of £63 2*s*. 5*d*. At the date of the passing of the Land Law (Ireland) Act, 1881, he had sublet 42A. 1R. 6P. to five sub-tenants, whose rents amounted to £62 0*s*. 8*d*., retaining in his own hands 3A. 2R. 15P. After the passing of the Act of 1881 all the sub-tenants' rents were reduced by fair rent agreements filed in Court, each sub-tenant obtaining a reduction, the last reduction being made by agreement dated the 4th March, 1884, and this reduced the sub-tenants' rents to £43 15*s*., which was the total rental receivable by the defendant at the passing of the Land Law (Ireland) Act, 1887, out of the portions sublet. In 1898, 1899, and 1900 the tenants obtained further reductions on second term rents fixed by agreements filed in Court, which reduced the total rents to £35, the last second term reduction being made by agreement dated 2nd August, 1900. On the 27th April, 1900, the defendant served notice of intention to surrender, which the plaintiff refused to accept. The defendant then served notice to fix a fair rent on the 3A. 2R. 15P. in his possession, and the fair rent was fixed at £2 18*s*. by the Land Commission on the 28th March, 1901; and on the 6th April, 1901, the defendant served a second notice of intention to surrender, tendered a deed of surrender, and paid all rent down to the 1st May, 1901. The plaintiff refused to accept the surrender, and sued for rent accrued down to November, 1902:—

Held, by the King's Bench Division (Palles, C.B., and Barton, J.; Andrews, J., *diss.*), that inasmuch as the rent receivable by the defendant at the passing of the Land Law (Ireland) Act, 1887, from the portions sublet had been reduced to a sum less than the rent paid by him, notice of intention to surrender should have been served by the defendant within nine months after the passing of the Act; that no new right of surrender arose on the subsequent reductions, or on the fixing of a fair rent on the part sublet; and that therefore the notice of intention to surrender had not been served within

(1) In the King's Bench Division, before PALLES, C.B., and ANDREWS and BARTON, JJ.

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the time prescribed by sect. 8, sub-sect. 8, of the Land Law (Ireland) Act, 1887, and the defendant was liable for the rent sued for.

Held, by the Court of Appeal (reversing the judgment of the King's Bench Division), that the notice of surrender served on the 6th April, 1901, was served in sufficient time within sect. 8 of the Land Law Act of 1887, and that the surrender was good.

MOTION to set aside judgment entered for the defendant by Wright, J., at the trial of the action and to enter judgment for the plaintiff.

By sub-grant in perpetuity dated 2nd July, 1873, G. A. Armstrong and Nathaniel Caldwell granted to Thomas Simpson 45A. 3R. 21P. of the lands Farmacaffley, in the county of Armagh, subject to the yearly rent of £63 2*s.* 5*d.*

The estate and interest of the grantor under this sub-grant became vested in the plaintiff, and of the grantee in the defendants. The greater part of the holding, viz. 42A. 1R. 6P. was sublet to five tenants, under five separate tenancies, and only the residue, 3A. 2R. 15P., remained in the possession of the defendants. The aggregate of the rents payable by these five tenants to the defendants at the time of the passing of the Land Act of 1881, was £62 0*s.* 8*d.* After the passing of that Act these five tenants got fair rents fixed by agreements duly filed in the Land Commission Court, the dates and particulars of which were as follows:—

1. Terence and James Curran's rent, originally £17 7*s.* 9*d.* was fixed at £13 7*s.* 9*d.* under originating agreement dated the 6th December, 1883.

2. James Cunningham's rent, originally £10, was fixed at £6 10*s.* under originating agreement dated 3rd April, 1883.

3. James Moon's rent, originally £14 10*s* 10*d.*, was fixed at £9 10*s.* under an originating agreement dated 21st May, 1883.

4. Ellen O'Hare's rent, originally £12 0*s.* 10*d.*, was fixed at £7 10*s.* under originating agreement dated the 4th March, 1884.

5. John Brooks' rent, originally £8 1*s.* 3*d.*, was fixed at £6 17*s.* 3*d.* under originating agreement dated the 28th February, 1884.

These fair rents made a total of £43 15*s.* receivable by the middleman from his five sub-tenants for the first term.

In 1898, 1899, and 1900, second term rents were fixed by

fair rent agreements duly filed in Court, the rents being in each case further reduced. The last of these second term agreements was dated the 2nd August, 1900, and filed in the Land Commission Court on the 14th November, 1900. The total sum receivable by the defendant from these second term rents was £35.

The defendant served notice of surrender on the 27th April, 1900, which the plaintiff declined to accept, and on the 30th June, 1900, the defendant served an originating notice to fix a fair rent on the portion of land, 3A. 2R. 15P., in his possession, and on the 28th March, 1901, an order was made fixing the fair rent of this portion at £2 18*s*. On the 6th April, 1901, the defendant served a second notice of surrender, and subsequently tendered a deed of surrender, and offered to pay all rent due up to the 1st May, 1901. The plaintiff refused to accept the surrender. The defendant refused to pay any rent subsequently. In an action for one and a-half year's rent of the lands, down to November, 1902, tried before Wright, J., without a jury, the Judge entered judgment for the defendant.

Jellett, *K.C.*, and *Poole*, for the plaintiff.

Cherry, *K.C.*, and *Fetherstonhaugh*, *K.C.* (with them *C. Murphy*), for the defendant.

Cur. adv. vult.

June 29.

BARTON, J.:—

This case turns on the construction of sect. 8 of the Land Law (Ireland) Act, 1887, and principally of sub-sect. 8 of that section. That section gave certain rights of surrender to middlemen all or part of whose holdings were sublet, and whose sub-rents had been before the passing of the Act, or might afterwards be, reduced to a certain point. In the case of a middleman, all of whose holding was sub-let, sub-sect. 1 provided that he might surrender when the rent received by him "has been reduced by the Court, or with the sanction of the Court, to a sum less than the rent which he pays." In the case of a middleman part only of whose holding was sub-let, which is the present case, sub-sect. 2 provided that he might surrender where "the rent received by the middleman for the part so sublet has been reduced by the Court, or with the

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sanction of the Court, so that when added to the fair rent of the part of the holding which is not sublet, to be ascertained and determined by the Court as hereinafter mentioned, it is of less amount than the rent paid" by him.

Three other sub-sections may usefully be referred to before coming to the 8th sub-section, on which this case mainly turns. Sub-sect. 3 provides that "in computing the amount of rent received by a person entitled to surrender, twenty per cent. deduction from the gross rent shall be allowed for cost of collection and other outgoings." Sub-sect. 9 provides the machinery for ascertaining the fair rent of the part of the holding not sublet, by giving the Land Commission jurisdiction "to ascertain and determine the fair rent of the part not sublet, as if such part constituted a holding, and the person claiming to be entitled to surrender were the tenant, and the person to whom the surrender is proposed to be made were the landlord, of such holding." Sub-sect. 10 provides that on surrender "all sub-tenants of the person surrendering shall thereupon become tenants to the person to whom such surrender is made, at the rents and subject to the conditions of their sub-tenancies under the person so surrendering."

All the provisions which I have read are in favour or relief of the middleman. But it is obvious that without some protection for the superior landlord this section might open the door to great risk of injustice to him. He has no knowledge, and is entitled to no notice, of the proceedings or agreements between the middleman and his sub-tenants. He has no means of checking or even of knowing the rents and conditions, or the changes from time to time in the rents and conditions, of the sub-tenancies. Accordingly, when this relief was given to the middleman it was only just that some right should be given to the superior landlord of challenging transactions which might have been, between 1881 and 1887, or might afterwards be, procured by collusion or undue influence, or be otherwise inequitable. To effectuate such a purpose, it would be necessary that the superior landlord should have notice of the reduction of rent on which the right to surrender was founded within such reasonable time as would enable him, if so disposed, to challenge effectively the transaction upon which the middleman's right to the statutory privilege depended.

Accordingly, as it seems to me, sub-section 8 was inserted in section 8 for the protection of the superior landlord. Sub-section 8 provides that "the person to whom a surrender is proposed to be made shall not be bound thereby, unless written notice of the intention to surrender be served within nine months after the passing of this Act, or within nine months of the making of the reduction of rent upon which the right to surrender is founded, whichever shall last happen," and the sub-section goes on to provide that "the person to whom a surrender is proposed to be made may apply to the Court to restrain the surrender, upon the ground *that the order of the Court reducing the rent* has been procured by collusion or other undue means, or that for any other reason the surrender is inequitable." This latter portion of sub-section 8 was not alluded to in the argument, but it seems to me to explain, to some extent at all events, the first part of the sub-section. It seems to me that the words "the order of the Court reducing the rent" in the latter part of the sub-section correspond to the words, "the making of the reduction of rent" in the earlier part of the sub-section. One reason for requiring the notice of intention to surrender to be served within a limited time after "the making of the reduction of rent upon which the right to surrender is founded" appears to have been to enable the superior landlord, while that reduction of rent was recent and fresh, to inquire and ascertain whether there were any grounds for exercising his right of moving to restrain the surrender. The right to move to restrain the surrender would be nugatory if it were not accompanied by an antecedent right to have reasonably prompt notice of the reduction of rent upon which the middleman's right was founded. There would be no necessity for providing that the notice should be within nine months of the fixing of the fair rent on the portion sublet, because that proceeding would be by originating notice served upon the superior landlord. But the reduction of rents of the sub-tenants would be behind his back, and it would be important to have prompt notice of the reduction of rent upon which the middleman's right to surrender was founded.

Such being the provisions of this section, I think that the purpose and meaning of sub-section 8 becomes tolerably clear.

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The danger to interested third parties of collusion or other improper influences in the fixing of rents, especially where fixed by agreement, has been guarded against by the framers of Land Acts and rule-makers under the Land Acts, where necessary (see for example as to incumbrancers and other parties interested in rents fixed by agreement, rule 143 of the present Rules of 1897, which is the same as rule 166 of the Rules of 1883, and also the provisions of section 10 of the Land Act of 1896, which renders rents fixed by limited owners, mortgagors, and mortgagees binding on their successors in estate; and rule 162 of the Rules of 1897, made in pursuance of that section). The Legislature may well have thought that there was special danger of such collusion or of some other cognate form of injustice, in the case of surrenders by middlemen to superior landlord under this section, where the right to surrender is founded on the reduction of the sub-rents. Remaindermen and other parties, who succeed to the estates of limited owners or of mortgagors or mortgagees, do so by operation of law, and ordinarily have knowledge and notice of their prospective rights, and live in expectation of succeeding eventually, or contingently, upon the determination of the intermediate estate. But the peculiarity of these surrenders under section 8 of the Land Act 1887 is that the superior landlord has no notice of, or voice in, the transaction, save in so far as he is protected by sub-section 8. The middleman can by his own action entitle himself to the privileges of this section. He can, by the simple and popular expedient of an agreement with his sub-tenants to reduce their rents, liberate himself from all his obligations to his own superior landlord, and transfer to the superior landlord's shoulders all his own sub-tenants at the rents and conditions of their sub-tenancies, as to which, or any change in which, the superior landlord need never have had any notice or knowledge.

Accordingly, to obviate this injustice, and to enable the superior landlord to avail himself of the right of moving to restrain the surrender, the section gave, in cases where the reduction of rent, upon which the right to surrender is founded, had already been made between 1881 and 1887, the only possible protection by providing that the notice should be given within nine months of

the passing of the Act, and in cases where the crucial reduction of rent might be made afterwards, it provided that the notice of surrender should be given within nine months after the making of such reduction.

I have thought it convenient to state, in the first instance, the provisions of the section and sub-section on which the decision of this case turns. I now come to the short facts of the present case. This was an action in which plaintiff claimed one and a half year's rent to November 1st, 1902, of certain lands containing about 45½ acres, and held under a sub-grant in perpetuity at the yearly rent of £63 2*s.* 5*d.* The defendant was a middleman, having about 42 acres sublet to five sub-tenants, and having the balance of the holding about 3½ acres in his own possession. His defence was, that before any of the rent claimed had accrued due, he had on April 29th, 1901, executed a valid surrender of his holding to plaintiff under the powers of surrender conferred upon middlemen by section 8 of the Land Act, 1887.

It appears that when the Land Act of 1881 was passed, defendant's sub-rents amounted to, in round figures, £62 per annum. In 1884 and 1885, he agreed with the sub-tenants to a reduction of their rents, which reduced his rental from £62 to, in round figures, £44, *i.e.* nearly £20 less than the rent which he was paying to plaintiff. After the passing of the Land Act of 1887, he took no steps to take advantage of the provisions of section 8 of that Act. In 1898 to 1900, he agreed with the sub-tenants to the fixing of second-term rents, which resulted in a further reduction of their rents to, in round figures, £35. These rents, both in 1883 to 1884, and in 1898 to 1900, were all fixed by originating agreement filed in Court. They were all behind the back of the plaintiff, who had no notice of them. The last of these second-term sub-rents was fixed by an agreement dated August 2nd, 1900, and filed November 14th, 1900.

On the 30th June, 1900, defendant served an originating notice to have a fair rent fixed on the three and a half acres in his own possession under the provision of sub-section 9 of section 8 of the Act of 1881, and on the 28th March, 1901, the order was made fixing the fair rent of that portion at £2 15*s.*

In order to comply with sub-section 8, the defendant served

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two notices of surrender, the latter of which, dated April 6th, 1901, is the one on which he relies. It was served within nine months after the fixing and filing of the last of the second-term rent agreements, and it was also within nine months after the fixing of the fair rent on the portion of land in the middleman's own possession. Mr. Cherry, for the middleman, contends that one or both of these events satisfied the description in sub-sect. 8 of "the making of the reduction of rent upon which the right to surrender is founded," while Mr. Jellett, for the superior landlord, contends that defendant ought to have served his notice within nine months after the passing of the Act of 1887, and that not having done so, his right to surrender under section 8 has lapsed.

Mr. Cherry presents his argument in two principal branches, either of which will serve his client's purpose. He argues in the first place that any order, reducing the rental of the middleman still lower than it was before, may found a right to surrender. Accordingly, he relies on the last of the second-term rents, which was fixed within nine months of his notice to surrender, as the making of the reduction of rent on which the right to surrender was founded. In other words, he contends that the middleman may wait, before serving his notice of surrender, for any number of years after his sub-rents have been reduced by the Court to a point below the head-rent, until by successive reduction the rents have been reduced, after a second or third term, to a vanishing point. According to this argument, each fresh reduction of rent reducing the middleman's rental still lower and lower below the amount of the rent he pays, is a fresh *terminus a quo* from which a nine months' notice of intention to surrender may commence to run.

On this branch of his argument Mr. Cherry relied to some extent upon the case of *M'Corkell* v. *Reid* (1), in which Andrews, J., held that, in a case under sub-sect. 1 of sect. 8, a middleman, whose sub-rent, after a first reduction of rent, stood at a sum less than the head-rent, might surrender his holding, notwithstanding that at the time of the passing of the Acts of 1881 and 1887, and before any reduction of his sub-rents was made, the rent he was

(1) 25 I. L. T. R. 65.

receiving was already less than the rent which he paid the head landlord. In the course of the present argument, Mr. Justice Andrews observed that in *M'Corkell* v. *Reid* (1) he decided no more than that the word "less," in sub-sect. 1 of sect. 8, meant "less." He was not considering the construction of sub-sect. 8 of sect. 8. In *M'Corkell* v. *Reid* (1) the notice of intention to surrender was served within nine months of the first order of the Court fixing a fair rent on a sub-tenant's holding. It was not suggested in that case, or in any other case, as far as I know, until the present case, that every fresh reduction of rent, making the sub-tenant's rents lower and lower below the head-rents, could give rise to fresh rights of surrender. The decision in *M'Corkell* v. *Reid* (1) does not seem to me to be inconsistent with the construction which I am inclined to put upon sub-section 8.

It seems to me that Mr. Cherry's construction gives no real effect to sub-sect. 8. It makes the provision as to notice within nine months a sort of optional and ambulatory time-table without meaning or purpose. The sub-section is plainly intended for the protection of the head landlord. But if this construction prevails, the protection disappears. The head landlord might get the notice of surrender long after the middleman's right to surrender accrued, when it would be impossible to trace or test the circumstances under which the rent was reduced, and the right to surrender arose. The section seems to contemplate a right being founded on a specific "making of a reduction of rent," which corresponds to the "order reducing the rent" in the latter part of the sub-section. It seems to deal with two classes of cases, those in which that crucial reduction has taken place before the passing of the Act, and those in which it may take place after the passing of the Act; and it provides a time limit applicable to one class of case, and another time limit applicable to the other. But this construction of the section suggested by Mr. Cherry gives every middleman, whose rent had been reduced before the Act below the amount of the head-rent, an option to serve the notice of intention to surrender within nine months of the passing of the Act, or within nine months after any further reduction. So far as defendant

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was concerned in fact, this sub-section, according to this view, was not restrictive at all; but was giving him a practically limitless option, instead of imposing a time limit for the protection of the head landlord. It seems to me that this construction deprives sub-section 8 of all force and meaning, and I cannot adopt it.

I do not attach much importance to arguments founded on sub-section 3 as to the allowance of 20 per cent. for collection and outgoings. The supposed cases of difficulty caused by that sub-section can be dealt with when they arise, and cannot, I think, affect the construction of the words of sub-section 8. The question whether at any particular time the sub-rents, less 20 per cent., and plus the fair rent of the part not sublet, are less than the head-rent, is a matter of fact which, when the fair rent of the part not sublet has been ascertained in the way provided by the section, can be settled in a Court of justice in like manner as any other question of fact.

The second branch of Mr. Cherry's argument is quite distinct. Even assuming that the right to surrender is founded once and for all at a particular time, Mr. Cherry argues that in a case under sub-section 2 there is no right to surrender until the fair rent has been fixed on the part of the holding not sublet. On this branch of the argument Mr. Cherry has against him the words of the sub-section itself, which makes the *terminus a quo* of the nine months the making of a reduction of rent, and does so, as I think, for the reasons which I have suggested. The right to have a hypothetical fair rent fixed on the part not sublet is a facility afforded to the middleman. No time limit is attached to it. It must be done before the surrender is actually made, but it would appear that it might be fixed either before or after the notice of surrender is served. It is the middleman's affair to do it as soon as he can, because he cannot actually surrender until the fair rent is fixed. I cannot suppose that the Legislature, in granting the middleman this facility, intended thereby to enable him to render nugatory the protection given to the superior landlord by sub-section 8. It seems to me that in this part of the argument there was some confusion of thought between the "right to surrender," the "notice of intention to surrender," and the "surrender" itself. The right to surrender is "founded upon" a certain reduction of

rent. The notice of intention to surrender must be given within nine months after that reduction of rent. The surrender itself cannot be effectually made until the hypothetical fair rent has been fixed upon the part of the holding which is not sublet, and until it appears that the reduced sub-rent, plus the hypothetical fair rent, is less than the head-rent. The right to surrender is a statutory privilege conferred upon the middleman, and not to be availed of by him unless he can bring himself within the requirement of the statute. He must make up his mind when he thinks himself entitled to surrender, and must then serve his notice within the prescribed time, and get his hypothetical fair rent fixed. The fixing of the hypothetical fair rent is a piece of machinery provided for the purpose of removing a difficulty from the middleman's path. But the right to surrender is not founded upon it. The superior landlord does not need any protection in respect of it. There is no reason for making the time for serving the notice of intention to surrender run from it. The crucial event upon which the middleman's right to surrender and the corresponding liability of the superior landlord are founded, is the reduction of sub-rents to a certain level by order or sanction of the Court. In the present case this crucial event occurred before the passing of the Act of 1887, and the middleman, if he wished to bind the superior landlord by his surrender, ought to have served his notice of intention to surrender within nine months after the passing of that Act.

For all these reasons I think that the plaintiff in this case was not bound by the surrender, and is entitled to judgment for the amount claimed.

ANDREWS, J.:—

Although it may not be necessary for the determination of this particular case to decide all the questions upon the construction of the 8th section of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33), which have been argued before us, I think it will be convenient to state my opinion on the construction of that section generally.

Its obvious intention was to relieve a middleman from loss if, by the action or sanction of the Court, his actual and obtainable

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income from his holding should be reduced below the rent he pays for it. The mode by which he is enabled to obtain this relief is by surrendering his estate in his holding, in accordance with the provisions of that section.

This is a privilege conferred, not an obligation imposed, upon him. Cases might arise in which the middleman's loss, by the specified reductions of the rent receivable by him, would not be of sufficient amount to make him desirous of surrendering his holding, which, notwithstanding a certain amount of present loss, he might, for a variety of reasons, still prefer to retain; and his right to surrender under the 8th section might even arise in a case in which, if the 20 per cent. allowed by clause 3 was more than sufficient (as it might be) for the cost of collection and other outgoings, he would suffer no loss of income by not surrendering. Subsequent reductions, however, might create so large a loss that he might be unwilling or even unable to bear it, and, therefore, be desirous of relieving himself from it by surrendering his holding. When the Act of 1887 was passed, the possibility at least of successive reductions of rents by or with the sanction of the Court was apparent, and I do not find anything in the language of the 8th section to limit the middleman's right of surrender to the first occasion on which it arises, or on which his present obtainable income from his holding is reduced below the rent he pays for it; and, in my opinion, his right to surrender under that section is not limited to the first reduction of rent which gives him the right to surrender thereunder, but arises upon every occasion on which, after the reductions referred to in the 8th section of the rents receivable by him, and the ascertained letting value of such part of his holding as may not be sublet, his present obtainable income from his holding (allowing the 20 per cent. mentioned in clause 3) is less than the rent he pays for it.

The words "the rent received by the middleman" as used in the 8th section, in my opinion, mean the total amount of rent received by him, and the reduction referred to in clause 1 (where the middleman's holding is wholly sublet) is a reduction of such total amount of rent, and, in my opinion, is neither ascertained nor "made" until the result is arrived at of the fixing, by or with

the sanction of the Court, of all the rents of his sub-tenants which have been made the subject of revision; and where only part of the middleman's holding is sublet, the reduction of rent referred to in clause 2 is also, in my opinion, neither ascertained, nor "made" until the result is arrived at of the fixing, by or with the sanction of the Court, of all the rents of his sub-tenants which have been made the subject of revision, *and* of the fixing of the "fair rent" of the part of his holding not sublet. This part of his holding is, under clause 9, to be dealt with by the Court *as if* it constituted a holding and the middleman was the tenant, and the head landlord the landlord thereof. For the purpose of clause 2, this part is to be regarded *as if* it was let to a tenant, and producing a fixed "fair rent." When the result is ascertained of the fixing of all the rents of the sub-tenants which have been made the subject of revision, the "fair rent" of the part not sublet (ascertained pursuant to clause 9) is, pursuant to clause 2, *to be added* to the middleman's actually reduced income, and it is only when it appears that the amount produced by such addition is (after the allowance of 20 per cent. under clause 3) less than the rent paid by the middleman, that his right of surrender is ascertained to exist.

In my opinion, the words the "making of the reduction of rent upon which the right to surrender is founded," in clause 8, when applied to cases within clause 1, refer to the total reduction produced by the fixing of all the rents of the sub-tenants whose rents have been revised; and when applied to cases within clause 2, refer to the total reduction made in the middleman's income (allowing the 20 per cent. mentioned in clause 3) by the fixing of all the rents of the sub-tenants whose rents have been revised, *after adding* to his income the amount of the "fair rent" of the part not sublet, treated for this purpose under clauses 2 and 9 *as if* let, and producing the "fair rent" placed by the Court upon it.

This construction of section 8 gives full effect to what, in my opinion, was its intention. That section must be so construed as to be applicable whether the part of the middleman's holding which is not sublet is large or small.

Until a fair rent showing the income derivable from that part

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is fixed, the middleman's loss is not definitely ascertained, though in some cases it may, and in others may not, be more or less clearly foreseen from the reductions of rent actually made; but the "fair rent" of the part not sublet is an amount which, in order to show definitely whether the right of surrender has arisen, must be added to the reduction of the middleman's income resulting from the reductions which have been actually made, and it is only after this has been done that it will definitely appear whether his actual obtainable income from his holding is less than the rent he pays for it.

In the present case, according to the view I take of the construction of the 8th section, I am disposed to think that the middleman was not entitled to surrender by reason of the reductions of his sub-tenants' rents, which were made before 1887, inasmuch as this case is within clause 2; but even if he was so entitled, he was not, in my opinion, bound to serve his notice of intention to surrender within nine months after the passing of the Act of 1887, and as the fair rent of that part of his holding which was not sublet was not ascertained by the Court until the 28th of March, 1901, and his notice of intention to surrender of the 6th of April, 1901, having, as required by clause 8, been given within nine months after what I regard as "the making of the reduction of rent on which the right to surrender was founded," that is within nine months from the definite ascertainment of what, as I construe the section, that reduction actually was, and having been followed by a deed of surrender of the 29th of April, 1901, pursuant to clause 7, I think the middleman's rent was thereupon extinguished, and that the rent which he has been sued for in this action as accruing after the 1st of May, 1901, is not recoverable, and consequently that the verdict and judgment for the defendant should stand.

I may add that I think it impossible to determine questions of the construction of this Act, and of others of the Land Law (Ireland) Acts, by any consideration of hardship. They must be construed having regard to their language and known intention, but I confess that I see nothing which can fairly be regarded as a *hardship* on the head landlord, although it was so presented by Mr. Jellett, arising out of the construction which I have given to

sect. 8, outside of what the Legislature, on any possible construction of it, has actually done thereby.

The longer the head landlord is left in receipt of the middleman's rent the better for him, if that rent exceeds the income otherwise obtainable from the holding, and the continued payment of the middleman's rent would seem to be a very adequate compensation for any uncertainty respecting the time at which it might cease to be payable.

PALLES, C.B.:—

There are two questions here:—

(1.) Whether, when all the rents of a holding within sub-sect. 2 of section 8 have been fixed, and the rent receivable by the middleman has been thereby reduced, the nine months' time for the service of the notice of intention to surrender by reason of such reduction runs from the last of such orders, or whether it does not commence to run until the "fair rent" for the part of the land not sublet has been fixed under sub-sect. 9?

(2.) Whether, when rent has been once reduced to such an amount that (if the fair rent of the part not sublet were fixed) there would be a right to surrender, and the time for giving notice of intention to exercise the right of surrender incident to such reduction has been allowed to elapse, a new right to surrender springs up upon every or any subsequent reduction?

I am of opinion as to the first question that the nine months runs from the last of the orders for reduction, and that it is not postponed until the "fair rent" of the part not sublet has been fixed; and as to the second question, that a new right to surrender does not arise upon the subsequent reduction.

My reasons for these conclusions are as follows:—

(1.) The answer to the first question depends on the meaning of the expression in section 8, sub-sect. 8, of the Land Law (Ireland) Act, 1887: "the making of the reduction of rent upon which the right to surrender is founded."

The section in question is one which confers privileges on particular classes of tenants, in derogation of theretofore existing contractual rights of their landlords, and for that reason is one which cannot receive any so-called beneficial or enlarged con-

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struction. If the case does not fall within the enactment, fairly construed according to the rules of construction applicable to it, the privilege has not been acquired. We cannot strain the section so as to apply it to a case in words not within it, unless there is an "absolutely necessary implication" which compels us to do so; and such a necessary implication will not arise merely because we think that the structure of the enactment would be more perfect if we gave it the enlarged construction. If the Legislature did not fit in together their various provisions, and thus left a gap, we have no jurisdiction to fill that gap. To do so would be to legislate, not to construe.

The right to surrender referred to in sub-sect. 8 may arise under either of the preceding sub-sections, 1 and 2. In cases within sub-sect. 1 (*i.e.* where the holding is wholly sublet) there is but one fact on which the right is founded—the reduction, by order or orders of the Land Commission, of the rent received by the middleman to a prescribed and ascertainable amount. It depends *wholly* upon the reduction of rent; and I apprehend that there can be no doubt that, in such cases, the time of "the reduction of rent" referred to in sub-sect. 8 is the date of the order (or of the last of a series of orders) of the Land Commission, whereby the rent of the sub-tenants is reduced to the amount specified in the sub-section.

In cases within sub-sect. 2, the right to surrender depends, not upon one, but upon two facts. There must be—(1), a reduction of rent, by order or orders of the Land Commission; (2), a fair rent, for the portion of the holding not sublet, must be determined at such a sum that the aggregate of it and the rents (as reduced) of the sub-tenants shall be below the ascertainable sum. In such a case the right to surrender depends upon the concurrence of these two facts, and may be said to be founded upon both of them.

But of these two facts, one only is within the expression we have to construe, "after the making of the reduction of rent." The words are not "after the right to surrender arises," or "accrues." Nor are they "after the reduction *and ascertaining* of the rent upon which the right to surrender is founded," or "after such a reduction of rent as will give a right to surrender."

The "reduction" is not altered in any way by ascertaining the fair rent. It remains the same; it is the one fixed quantity, whether or not there be an ascertainment within sub-sect. 9. What is affected by the ascertainment is the right to surrender, not the reduction. The words in the expression in question point to that which is certain, and independent of the determination of the fair rent—the reduction, and not to that which would remain uncertain and contingent, till the fair rent was determined, viz. the right to surrender.

Of the two factors upon which that right is founded, the sub-section specifies one—the "reduction" of rent; and it so specifies it with perfect propriety of language; because in all cases, as well those within sub-sect. 2 as those within sub-sect. 1, the right to surrender is *founded* on the reduction. Such a right cannot exist unless there has been a reduction.

The difficulty in the construction suggested by the defendant does not arise from the word "rent," because, under sub-sect. 9, the sum fixed by the Land Commission is to be deemed "rent." It arises upon the word "reduction." There can be no reduction of rent where no rent theretofore existed.

I see no inconsistency, absurdity, or injustice in reading this word "reduction" in its ordinary sense; especially where, as regards cases within sub-sect. 1, it must be read in that sense; and I feel myself unable to give it any such extended construction as would include the ascertainment and determination within sub-sect. 9. There is no hardship in this construction. What difficulty would a tenant be under in serving notice under sub-sect. 9 to fix his fair rent, contemporaneously with his notice of intention to surrender, or at all events before the time of surrender, in which case we would have to determine the effect on the right to surrender of judicial delay in fixing the fair rent. This argument derives further corroboration from the nature of the proceeding under sub-sect. 9, which I think is in substance procedure and little more. Further, were it necessary, as it is not, to show an affirmative intention that the section should be read in the manner I have read it, I agree with Barton, J., in finding evidence of this intention in two parts of sub-section 8: 1st, in the words of this part of the sub-section. It is plainly a

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provision in favour of the landlord, and by the construction in question is rendered practically inoperative in cases within sub-sect. 2. 2nd, in the provision in the concluding part of the same sub-section which confers on the head landlord the right to apply to the Court to restrain the surrender upon the ground that for any reason it is inequitable.

The second question depends upon the meaning of the words in sub-sect. 1, "reduced *to* a sum less than the rent which he pays," or their equivalent, *quoad hoc*, in sub-sect. 2, "reduced *so* that when added to the fair rent it is of less amount than the rent." In my opinion, to be capable of being reduced to an amount which answers a particular description, the sum so to be reduced must, before the operation of reduction, be greater than the amount which answers the description. If a rental received by a middleman be already less than the rent he pays, the Land Commission cannot be said to reduce it to a sum less than the rent he pays. It is already less than that rent, and is so less irrespective of the action of the Land Commission. What the section contemplated was a reduction by the Land Commission, *from* an amount equal to or greater than that rent, *to* a sum below it.

It is said that the words "from, &c.," are not in the section; but when we know the *terminus ad quem*, and know that that is to be arrived at by a "reduction," we know that the *terminus a quo* must be something greater than the *terminus ad quem*.

Further, were the other construction the true one, a middleman whose rent had not been reduced by the Land Commission, but whose head-rent was, nevertheless, more than the rent receivable by him, might, in the event of those rents being further reduced by the Land Commission, claim the benefit of the section. But I think that the mischief intended to be remedied was, that leases theretofore not burthensome had been rendered burthensome by the action of the Land Commission; and that the remedy was to relieve the owner of such a lease, by enabling him to surrender it. For this reason I am unable to adopt the view taken by Andrews, J., in *M'Corkell* v. *Reid* (1).

In result, then, I am of opinion that the notice of intention to

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surrender has been served too late, and that the verdict and judgment should be changed, and entered for the plaintiff for the amount claimed with costs.

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The defendant appealed (1).

G. Fetherstonhaugh, K.C. (with him *Cherry, K.C.*, and *C. Murphy*), for the appellant:—

Where the rent received by the middleman is reduced by the Court, the middleman is entitled to surrender his holding under sect. 8 of the Act of 1887, notwithstanding that, at the time of the passing of the Act, such rent was already less than the rent he paid to the head landlord: *M'Corkell* v. *Reid* (2). "Reduction of rent" means the same in sub-sect. 2 of sect. 8 as in sub-sect. 1.

Sub-sect. 2 contemplates two operations before the right to surrender can be ascertained: (1) reduction by the Court of the rent received by the middleman, and (2) ascertainment of the amount of fair rent to be assessed on the land in hand. If these two amounts are less than what the middleman pays, after deducting the 20 per cent. mentioned in sub-section 3, then he is entitled to surrender. That brings us to sub-sect. 8, and to give an intelligible meaning to that sub-section the reduction of rent on which the right of surrender is founded must include the ascertainment of the fair rent of the land in hands. If this were not so, the middleman would have to serve notice of intention to surrender without knowing whether he had the right to surrender or not, which is given to him by sub-sect. 2.

Upon any reduction of any portion of the rent received by the middleman, he is entitled to surrender, and the dates in this case will fit in with either of those propositions.

Jellett, K.C., Wakely, K.C., and *H. R. Poole*, for the respondent:—

(1) In the Court of Appeal, before FITZ GIBBON, WALKER, and HOLMES, L.JJ.

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We submit that where there was a deficit in what the middleman received before 1881, sect. 8 of the Act of 1887 does not apply at all. The entire essence of that section is "reduction by the Court; these are the words used in sub-sects. 1 and 2, and sub-sect. 8 says "order of the Court reducing the rent." Any reduction of rent other than by the Court is outside the operation of this section. If the rent received by the middleman is already less than the rent he pays, the rent cannot be said to be reduced by the Court; it is already less. What brings the Act into operation is the reduction of the amount received to a sum less than the rent paid. Secondly, we submit that even if the Act of 1887 applies, the middleman has lost his right to surrender, because he did not apply within nine months after the passing of the Act of 1887. The fixing of the fair rent of the portion of land in hands is not reduction. Unless the judgment of the Court below is right, the right to surrender is unlimited to the end of time. There is a limitation for commencing the proceeding; it is in sub-sect. 8; reduction of the rent, or the passing of the Act of 1887, whichever is last, is the *terminus a quo*. The equity clause at the end of sub-sect. 8 cannot apply, if there is no time limit. Surrender and intention to surrender are two different things. Sub-sect. 9 deals merely with procedure.

Dec. 15.

FITZ GIBBON, L. J.:—

The plaintiff as landlord sues the defendant as tenant under a sub-grant in perpetuity, dated July 2nd, 1873, claiming one and a half years' rent due and ending November 1st, 1902, at the rate of £67 17*s.* 5*d.* per annum. The receiver's fees are stated to be payable upon default in payment of the reserved rent of £63 2*s.* 5*d.* within a specified time, and therefore in dealing with the figures I shall take the rent payable by the grantee as £63 2*s.* 5*d.* only.

At the passing of the Land Acts of 1881 and 1887 all the land was sublet to five occupying sub-tenants, except 3A. 2R. 15P. in the possession of the grantee, and the case depends upon the applicability of the Land Act, 1887, sect. 8, enabling middlemen to surrender holdings which by the working of the Land Acts have become onerous. The case was tried without a jury by Wright, J., who gave judgment for the defendant.

In the King's Bench, Barton, J., and the Chief Baron, entered judgment for the plaintiff, substantially on the same ground; but Barton, J., seems to have been influenced to some extent by considerations of "risk of injustice" to the superior landlord, which seem to me to be met by the second clause of sub-sect. 8, and by observing that any delay by the middleman in proceeding to surrender would only leave the presumably larger rent reserved by the mesne demise so much the longer payable to the superior landlord. Andrews, J., agreed with Wright, J., and thus the matter comes before us upon a balance of opinion in the High Court.

Taking the head-rent at £63 2*s.* 5*d.* at the passing of the Land Act, 1881, the sub-tenants rents amounted in all to £62 0*s.* 8*d.* Sect. 8, sub-sect. 3, contains a mandatory provision that in computing the amount of rent received by a middleman entitled to surrender, 20 per cent. deduction from the gross rent shall be allowed for cost of collection and other outgoings. Therefore, the rent received in 1881 is to be computed as £13 9*s.* 8*d.* less than the rent paid by the middleman. As against this the middleman had the occupation interest in 3A. 2R. 15P. in his own hands. The "fair rent" of this part of the holding has recently been determined to be £2 18*s.*, and it is therefore clear that there was a deficit in 1881, which was increased in 1884 by judicial reductions of the sub-tenants rents, and was of considerable amount in 1887, but its precise amount could not be ascertained until the fair rent of the part not sublet was determined.

Under the Land Act of 1881 the five sub-tenants fixed fair rents, each obtaining a reduction sanctioned by the Land Commission; the last reduction was made by agreement dated 4th March, 1884, filed June 20th, 1884. It brought down the gross rental of the middleman to £43 15*s.*, and increased the computed deficit of the rent received to £28 2*s.* 5*d.* The middleman took no proceeding to surrender within nine months, or at all, after the passing of the Act of 1887; he held on, paying the head-rent and bearing the loss, until the sub-tenants obtained further reductions on fixing "second-term rents" in 1899 and 1900, and the contentions of the plaintiff are (1) that because there was a deficit before 1887, sect. 8 does not apply; or (2) that if the Act of 1887 applied, the middleman then only got the

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right to surrender once and for all, and lost it because he did not exercise it within nine months after the passing of that Act. Each of these contentions involves the exclusion from the right of surrender of every case in which the middleman had not a profit rent exceeding the rent paid by 20 per cent. before the reduction on which he claimed the right to surrender; and the second involves the exclusion for ever afterwards of any middleman who does not claim the right within nine months after the particular judicial reduction which first reduces his rental to a sum less than 20 per cent. above the rent paid by him.

The fixing of the second term rents reduced the under-tenants rents by £7 more, thus making the shortage of the middleman £35 2*s.* 5*d.*, or, not deducting the 20 per cent., £28 2*s.* 5*d.* Against this he had only the 3A. 2R. 15P. of land in his own possession. The last second term reduction was made by an agreement dated August 2nd, 1900, which was filed and sanctioned by the Land Commission on November 14th, 1900; the other four under-tenants had previously obtained reductions, the last of which was filed on January 10th, 1900, and on April 27th, 1900, the defendant served a notice of surrender on the plaintiff, which the plaintiff declined to accept. Thereupon the defendant, on June 30th, 1900, served an originating notice under sect. 8, sub-sect. 9, to fix a fair rent upon the land in his own possession. This was fixed at £2 18*s.* by order of the Land Commission dated March 28th, 1901, and on April 6th, 1901, a second notice of surrender was served, followed by the delivery of a draft surrender which the plaintiff refused to approve, by the execution of a deed of surrender on April 29th, 1901, and by payment of all rent up to May 1st, 1901. On these facts the question is whether the defendant's tenancy was validly surrendered under the Land Act, 1887, sect. 8.

The Chief Baron held:—

> "If a rental received by a middleman be already less than the rent he pays, the Land Commission cannot be said to reduce it to a sum less than the rent he pays. It is already less than that rent, and is so less irrespective of the action of the Land Commission. What the section contemplated was a reduction by the Land Commission from an amount equal to or greater than that rent to a sum below it."

The reverse was held by Andrews, J. in *M'Corkell* v. *Reid* (1), twelve years ago, and I cannot find that this decision has been questioned until now.

What is the true construction of the Act? Section 8, subsect. 1, deals with the simple case of a holding wholly sublet. The words are as follows:—

> "Where the rent received by the middleman has been reduced by the Court, or with the sanction of the Court, *to a sum less* than the rent which he pays, he may surrender his estate in such holding."

To limit this enactment as the Chief Baron has done, we must introduce, or imply, words which are not there; we must read the clause as limited to the case where the rent received has been reduced *from a sum more* to a sum less than the rent which he pays. The privilege of surrender is given because the reduction of the middleman's income is the act of the Court, or is inflicted with the sanction of the Court. If one middleman was already receiving a little less than he paid, and a second had a profit rent of less than 20 per cent., and a third had a small profit rent above 20 per cent., and if the gross rental of each of these middlemen was reduced by the Court by the same amount, or by the same percentage, say by £100 a year, or by 40 per cent., thereby inflicting a serious annual loss upon No. 1, turning the small profit of No. 2 into a loss, and reducing the considerable profit of No. 3 to a profit of less than 20 per cent., is it conceivable that the privilege of surrender was given only to No. 3, who still had a profit rent, and that neither No. 1 nor No. 2 was within the Act? No reason has been suggested for such a result, and I cannot feel justified in reading words into the Act in order to bring it about.

When the Act of 1887 passed, further reduction of rents, as well by fixing fair rents for the first time on holdings not previously brought into Court, as also by fixing second-term rents upon the expiration of the current term of fifteen years, where judicial rents had been already fixed, must have been contemplated by the Legislature; all the Land Acts are to be read as one, and there is no suggestion of any distinction, nor of the necessity for any

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condition precedent to the right to surrender except that which is prescribed in sub-sect. 1 itself.

In my opinion, the one and only essential condition to the applicability of sect. 8, sub-sect. 1, is the reduction by judicial action, or with judicial sanction, of the rent received by the middleman to a sum (*i.e. a total sum*) less than the total rent which he pays, and neither expressly nor by implication is the fulfilment of this condition made dependent upon the rent received before the judicial reduction having been more (*i.e.* more than 20 per cent. more) than the rent paid by the middleman. Whenever a judicial reduction is made which makes the rent received less than it was before, and at the same time cuts down the total rental receivable to a sum less than the rent paid, sect. 8, sub-sect. 1, in my opinion, applies, and it cannot be excluded by the circumstance that it was not a case of *damnosa hereditas* created for the first time by the action of the Land Acts, but was a case of *damnosa hereditas* thereby made *damnosior*, or even *damnosissima*.

If this be so, it would end this case, if the holding had been wholly sublet, because a notice of the intimated surrender was served within nine months after the last reduction of a subtenant's rent, which was filed and sanctioned by the Land Commission on November 14th, 1900. It remains to see how the position of a middleman whose holding is only partly sublet, differs from the case where the holding is wholly sublet.

Sub-section 2 provides in the very same words as sub-sect. 1 for making the reduction of the rent by or with the sanction of the Court the condition precedent to the right of surrender, and, in my opinion, the only object of sub-sect. 2 is to provide "where only part of the holding is sublet" for ascertaining what would otherwise be an unknown quantity, namely, "the fair rent of the part which is not sublet," in order to work out the same result as in the former case.

Algebraically expressed, if a is the head-rent paid, and b is the gross rent received by the middleman, he will be entitled to surrender under sub-sect. 1 if, after judicial reduction, $\frac{4b}{5}$ is less than a, whereas if x represents "the fair rent of the part not sublet," the middleman, who in that case comes under sub-sect. 2, must be

enabled to show that a, after like reduction, is more than $\frac{4b}{5} + x$. Sub-sect. 9 provides for eliminating x, and when this is done, sub-sects. 1 and 2 work alike. This having been done in the present case, the defendant was, in my opinion, entitled to surrender.

A further point was, however, raised against him upon sub-sect. 8, viz. that he was too late in giving notice of his intention to surrender. Sub-sect. 8 provided that—

> "The person to whom a surrender is proposed to be made shall not be bound thereby, unless written notice of the intention to surrender be served within nine months after the passing of this Act, or within nine months after the making of the reduction of rent upon which the right to surrender is founded, *whichever shall last happen*."

The plaintiff's counsel relied on these last words, but they seem to me to have been introduced merely to make it clear that, in the case of reductions made within nine months before the Act, the tenants should have the full period of nine months within which to serve their notices, but that after the Act any reduction upon which it is proposed to found a claim of the right to surrender must be followed by service of the written notice of the intention to surrender within nine months after what the second clause of the same sub-section describes as "the order of the Court reducing the rent."

The contention of the plaintiff is that the period of nine months began to run once and for all upon the making of the earliest order which had the effect of reducing 80 per cent. of the middleman's gross rent to a sum less than the rent which he paid; in other words, it was contended not only that the Act did not extend to any case in which, before the Act, 80 per cent. of the rent received was less than the rent paid, but furthermore that sub-sect. 8 imposed the further condition that unless the written notice was served within nine months after the making of whatever reduction of a sub-tenant's rent had the effect of turning the scale in the equation, and of making a more than $\frac{4b}{5}$ under sub-sect. 1, or more than $\frac{4b}{5} + x$ under sub-sect. 2, the right of surrender was lost, and could never afterwards be claimed, no matter how often or how much the middleman's gross rent might be cut down by subse-

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quent judicial reductions. There were many middlemen's estates in Ireland in 1881 and in 1887, where the sub-tenants were numbered by hundreds. Even where such estates were wholly sublet, it would be practically impossible, where the sub-tenants' rents were reduced one by one, or in batches, to calculate the precise moment when the scale was turned, or to identify the particular reduction or order which first gave the right to surrender, and which, if the plaintiff's contention be right, started the period of nine months against the middleman.

In cases under sub-sect. 2 the thing would be not only practically but even theoretically impossible, because there the turning of the scale would depend not merely upon the reduction of the sub-tenants rent, but upon its effect coupled with the subsequent determination of the fair rent of the part not sub-let. I cannot give such a construction to the Act.

I hold that, whether under sub-sect. 1 or sub-sect. 2, any reduction of rent which the middleman can prove to have had the effect of bringing his receipts down to a sum less than his payment of rent gives him a foundation for the right to surrender, but he must claim that right within nine months, and in cases within sub-sect. 2 he must also obtain a judicial determination of the fair rent of the land not sub-let which will show that the addition of that fair rent to 80 per cent. of the reduced amount receivable from sub-tenants still leaves what he receives less than what he pays.

I do not consider it necessary to discuss further questions which do not arise upon the facts of this case, such as whether judicial rents must be fixed for all the sub-tenancies on the holding, and whether in cases within sub-sect. 2 the middleman may not serve his notice within nine months after the order determining the fair rent of the land not sub-let, or even within an undefined period after that order. We may suspect that sub-sects. 1 and 8 were in the Bill before sub-sect. 2 was introduced, but we cannot interpret the Act on such suspicion. I am at present inclined to think that the right of surrender is not confined to holdings upon which all the sub-tenants have fixed judicial rents, and that a middleman can not ground the right to surrender on the ascertainment of a fair rent for land in his own hands, unless there has

been an order of the Court reducing a sub-tenant's rent within nine months immediately preceding the service of written notice of the intention to surrender. But I leave these questions open until they arise, and I base my judgment on the broader ground which I have stated, especially as the most important point of it has been already held without question for twelve years by the decision of Andrews, J. in *M'Corkell's Case* (1).

The appeal must be allowed, and the verdict and judgment of Wright, J., in favour of the defendant must be restored, with costs here and below.

WALKER, L. J.:—

In this case important questions arise as to the construction of the 8th section of the Land Act, 1887.

Part of the holding was in hand, and the rest was sublet to five tenants. Prior to the passing of the Land Act, 1887, all the sub-tenants' rents had been reduced by agreements, filed in Court, to a sum less than the rent payable by the middleman. The sub-tenants subsequently applied for a second-term reduction, and on the 14th November, 1900, the last of those reductions was made. The middleman on the 27th April, 1900, served notice of intention to surrender, which was not accepted; and on the 30th June, 1900, he served notice to fix a fair rent on the part in hand, and this was fixed on the 28th March, 1901, and then the middleman on the 6th April, 1901, served a second notice to surrender, which he followed up by executing a deed on the 24th April, 1901, which was not accepted.

The middleman has paid into Court all rent payable under his contract up to and including the 1st May, 1901, and he contends that he is not liable for any rent which accrued after the gale day following the surrender of the 24th April, 1901, and that the notice of intention to surrender served on the 6th April, 1901, or, if not, that served on the 14th November, 1900, was served in sufficient time within the meaning of the 8th sub-sect. of sect. 8. The question is one arising on the construction of several sub-sections of the 8th section of the Land Act of 1887, and however

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we decide it, we shall have the misfortune to differ from the views of two out of the four Judges before whom the case has come.

In my opinion the decision of Andrews and Wright, JJ. was in result right. I think that the notice of the 6th April, 1901, was a notice of intention to surrender served in sufficient time, and that no right to surrender, or obligation to serve notice, arose till the fair rent had been fixed on the part in hand on the 28th March, 1901, and I do not think it necessary to consider the validity of the notice served on the 14th November, 1900, or any other question which has been argued.

The middleman, as I have said, pays rent for a holding only part of which is sublet, and the rest—a small portion—is in hands, and the principal question is whether the nine months' time for the service of the notice of intention to surrender runs at all until the fair rent on the part not sublet has been fixed, under sub-sect. 9 of section 8.

Section 8, sub-sect. 1, deals with the case where a middleman pays rent for a holding which is already sublet, and gives a right of surrender to the middleman when, to use the language of the sub-section, "the rent received by the middleman has been reduced by the Court, or with the sanction of the Court, to a sum less than the rent which he pays." Upon that there is engrafted by sub-section 8 a qualification which undoubtedly applies to sub-sect. 1, viz. that "the person to whom a surrender is proposed to be made shall not be bound thereby unless written notice of the intention to surrender be served within nine months after the passing of this Act" (22nd August, 1877) "or within nine months after the making of the reduction of rent upon which the right to surrender is founded, whichever shall last happen." There is no doubt that sub-sect. 8 qualifies the right when the holding is wholly sublet, and equally no doubt that "reduction" is in that case used in its proper and literal sense; but a serious question arises whether the reduction there mentioned is confined to the first reduction which brings the rents received to less than the middleman pays, or whether he has a fresh start when a subsequent reduction takes place.

In my opinion, that question does not arise in the present case, because the case wholly turns upon sub-section 2, for the construc-

tion of which, no doubt, all the other sub-sections may be called in aid.

Sub-section 2 is as follows:—[The Lord Justice read the section.] The whole of the rents of the part sub-let was here in this case reduced, so that the question does not arise whether that event is a condition. No doubt the first sub-section confers the right of surrender when the rent receivable has been reduced by the Court, or with the sanction of the Court, to a sum less than the rent payable, but when part is sub-let the right of surrender does not arise by the mere reduction of rent in the part sub-let, but on that combined with the circumstance that the reduced receivable rent, "when added to the fair rent of the part of the holding which is not sub-let (to be ascertained as provided), is less than the rent receivable." When that happens, and in my opinion not till then, the middleman, to use the words of the sub-section, "then also may surrender his estate in manner aforesaid." In the first sub-section the event is a single one; in the second it is a composite one of Court reduction and Court ascertainment, which, making one arithmetical sum, is found to be less than the rent receivable. The right to surrender is founded upon the existence of this composite sum at a figure less.

That figure here was not ascertained till the 28th March, 1901, and a notice of intention to surrender was given in ample time. This apparently plain result, arising from the words of the sub-section, has been met in argument in two ways—(1) on the language of sub-sect. 2 itself; (2) by the application of the qualifying sub-sect. 8. It is said that "reduced by the Court, or with the sanction of the Court," are the same as in sub-sect. 1, and that he is bound to serve his notice of intention to surrender then, and that the words "then also" only mean an expression of the power of the surrender, and do not bring in as a part of the condition precedent to notice and surrender the ascertainment of the fair rent without which the "less amount" cannot be found to exist. In my opinion, that which was complete in the first sub-section by the Court reduction was incomplete under the second sub-section, till the materials for ascertaining completion existed, and the power of surrender, or acting in any way upon the deficit to meet the middleman's rent, did not arise till the fair rent

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had been fixed. This, I think, is absolutely plain on the second sub-section, unless it is controlled by a qualification under sub-sect. 8.

That consideration raises two questions—(*a*) whether sub-sect. 8 applies at all to a case under sub-sect. 2; (*b*) whether if it does it is not capable of receiving a construction which will bring it into harmony with sub-sect. 2 in its obvious meaning.

The 8th sub-sect. is as follows. [The Lord Justice read the sub-section.] That sub-section plainly applies to and qualifies sub-sect. 1. The words "nine months after the making of the reduction of rent upon which the right to surrender is founded" are apt in every word to meet that sub-section. But then it is said sub-sect. 8 does apply to sub-sect. 2, but in its application we must read "reduction of rent" in its literal sense. These words are inapplicable to ascertainment by way of fair rent; consequently the nine months start with the Court reduction, and there was a Court reduction founding a right before the Act passed.

The answer is, I think, either the 8th sub-sect. applies or does not, and in order to test that we must first ascertain the true construction of sub-sect. 2. If it cannot be applied to that sub-sect. 2 when properly construed, then it cannot be applied at all, and I am satisfied that the reduction of rent by itself does not give the right under sub-sect. 2, and it would be impossible to give a different starting point for right to surrender, and the running of the time which would bar the right; consequently, as it would be inapplicable, there would be no time limit as regards sub-sect. 2, and any delay on the part of the middleman in fixing fair rents which might affect rights would be met by the clause which enables the Court to restrain a surrender when it would be inequitable. But for my part I think the better view, having regard to the collocation of the sub-section, and the general rules as to the construction of statutes, is that sub-sect. 8 and sub-sect. 2 should be read together, and that the words "reduction of rent upon which the right to surrender is founded, whichever shall last happen," refer to and describe the reduction below the rent receivable which is collected from the composite arithmetical sum which furnishes the right to surrender when once found to exist. There must be a "reduction of rent" below the middleman's rent

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by the composite process before the right can arise. If I am right in my construction of sub-sect. 2, and sub-sect. 8 applies, we are bound to give it, if possible, a construction which will make both work together, and I see no difficulty in giving the word "reduction," qualified as we find it by "upon which the right to surrender is founded," the meaning I have stated.

If the view which I have taken is correct, the other questions argued become unnecessary to consider. But I think it is by no means clear on the two sub-sections that a fresh right of surrender did not arise when the last reduction took place, though it had not been before asserted. It may be well said that the literal event happens, and the Act does not say the first reduction which creates the diminution, and that it is a privilege from the non-assertion of which all results in benefit to the landlord. I prefer, however, to rest my judgment on the other ground, and I decline to give an opinion on this point of fresh right arising.

With regard to the decision in *M'Corkell* v. *Reid* (1), I think that case was well decided; the reduction by the Court is the material factor, a binding decision affecting contract rights for fifteen years, and in fact it makes the rent less—not the less so because it was already, apart from the Act, less before. This point also is not material for the decision if I am right.

It was said, and the argument found favour in the Court below with two of the Judges, that in a case under the 2nd sub-section the middleman might and was bound to serve notice of intention to surrender when the Court had reduced the rent of the sub-let part without waiting to see whether such notice would ever be operative. I do not think that was the kind of action the Act contemplates. I asked Mr. Jellett to state its form from his point of view, and, as stated, it utterly fails to satisfy my idea of a notice of intention. It cannot be disputed that such a form would be inapplicable to the case of sub-section 1. Barton, J., says the middleman must "make up his mind when he thinks himself entitled to surrender, and must then serve his notice within the prescribed time, and get his hypothetical fair rent fixed. The

(1) 25 I. L. T. R. 65.

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fixing of the hypothetical fair rent is a piece of machinery provided for the purpose of removing a difficulty from the middleman's path, but the right to surrender is not founded upon it." With great respect it cannot exist without it, and he derives the right under the originating notice supplied by the forms in order that he may get a foundation for his surrender.

I wholly fail to see what ground of hardship can be alleged by the landlord who on the hypothesis continues to get his full rent. I cannot imagine what object the middleman could have in delay, but if he delays unduly, so that rights are affected, the surrender can be restrained as inequitable.

HOLMES, L.J.:—

The points in issue and the material facts have been fully stated by my colleagues.

It is especially to be noted that from 1881 onward part of the lands included in the defendant's fee-farm grant was in his own hands, that fair rents had been fixed by originating agreement for the portion let to tenants first in 1883 and 1884, and again after the expiration of the terms of fifteen years in 1899 and 1900, that the earliest originating agreement for the second-term rents was filed on the 7th January, 1899, and the latest on the 14th November, 1900, that the defendant served notice of surrender on the 27th April, 1900, and a similar notice on the 6th April, 1901, and that he had a fair rent fixed for the land in his own hands on the 28th March, 1901. Bearing in mind these facts and dates, I turn to sect. 8 of the Land Law (Ireland) Act, 1887. The object of this section is to enable a middleman to surrender his holding when the value of his interest has been reduced either by the Land Commission, or with the sanction of the Land Commission, below the rent payable by him.

The first clause of the section deals with cases in which all the middleman's holding is sublet to one or more tenants, the second clause relates to cases in which only part is sublet, the rest being in possession of the middleman. I propose to consider, in the first place, what is the event that gives the middleman the right to surrender in each of these cases irrespective of the period within which such right is to be exercised.

Where the holding is wholly sublet, the condition entitling the immediate tenant to claim the benefit of the clause is the reduction, by or with the consent of the Court, of the rent received by him to a sum less than the rent he pays. A manifest question arises on these words, which will be best understood by a concrete illustration. If the holding is sublet to five tenants, and only one has a fair rent fixed, with the result of reducing the aggregate rent received by the middleman below his own rent, does he thereupon become entitled to surrender, or must he wait till all the sub-tenants have fair rents fixed before this right can be ascertained? Andrews, J. took the last-mentioned view; and although it might be possible to dispose of this appeal without expressing any definite opinion on this point, it seems to me to be so closely connected with the construction of the section, as a whole, that I cannot avoid considering it; but in doing so I speak for myself alone. The natural meaning of the words "where the rent received by the middleman has been reduced by the Court," is where the whole of the rents have been so reduced—in other words, the rental: and I think any other construction would be repugnant to the principle that underlies the section. That principle makes the right to surrender depend upon judicial decision, and this involves the ascertainment by the Court of a fair rent for the holdings of all the sub-tenants.

It is to be remembered that if these holdings are within the Land Acts, the middleman can himself have fair rents fixed, if he so desires, and it is only where a sub-holding is outside the Acts that there would arise a difficulty, which could, however, be overcome in most instances by the middleman taking up possession.

There is another matter which Palles, C.B., holds to be fatal to the defendant. Before any reduction was made under the Land Acts, the sum received by the middleman from his tenant was below his own rent. The Chief Baron held that this prevented him from taking advantage of the section, although the difference was greatly increased when the first-term rents were fixed. I am of the contrary opinion. I concur in the decision of *M'Corkell* v. *Reid* (1). All that the clause

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requires is a reduction by the Court to a sum less than the middleman's rent. It is said that this implies a reduction from a sum higher than his rent. I am unable to conceive any reason for such a construction.

As I have already pointed out, what the section points to is a judicial determination of what the sub-rents ought to be; and the amount they stood at previously as the result of private arrangement is immaterial to the event which confers the right of surrender. I must decline to introduce into a statutory provision a term which is certainly not required by necessary implication, and which would, in my opinion, be inconsistent with the object of the Legislature. I therefore hold that the event on which the right to surrender arises under the first clause is a reduction by the Court of the middleman's previous rental, irrespective of the amount of such rental, to a sum less than his own rent.

The second clause applies to cases like the present, where the middleman occupies part of the lands, and the event upon which his right depends must necessarily differ from that specified in the preceding clause. The rental of the portion sub-let must be reduced by the Court below what it stood at previously, but that is not enough. It must be so much reduced as that when there is added to it the fair rent of the land in hands, ascertained in the manner prescribed, the aggregate will be less in amount than the rent paid by the middleman.

Thus it appears that two things must be done by the Land Commission before the right arises—(1.) The fixing of fair rents on the sub-tenants' holdings; (2.) The ascertainment of the fair rent of the land in the occupation of the middleman. It is, I think, as clear as language can make it that both these events must precede the right of surrender. Therefore, if there was nothing more in the section, there could be no doubt that the defendant was entitled to surrender on the 28th March, 1901, and not before.

There is, however, another clause to be considered. The object of sub-section 8 is to fix a time within which written notice of the intention to surrender must be given by the middleman. The time limit is declared in the words "within nine months after the passing of this Act, or within nine months after the making of the

reduction of rent upon which the right to surrender is founded, whichever shall last happen." The most obvious criticism on this clause is that, taking it in its strictly literal sense, it only applies to the first clause of the section, and not to the second. The right to surrender in the first clause depends upon reduction of rent. Therefore, as far as it is concerned, the limit of time is clear. But this is not so in the second clause. In it there is superadded the ascertainment of a fair rent of the land in hands. Palles, C.B., and Barton, J., have construed the words quoted as if they were equivalent to within nine months after the making of the reduction of rent; and they pass over the rest of the sentence, "upon which the right to surrender is founded."

If I were to adopt a rigid rule of construction, I must hold that there is no limit of nine months in cases coming under the second clause. At the same time I am disposed to think that without undue violence to language the words may mean "after the ascertainment of the fair rent upon which the right of surrender is founded." Therefore, *quacunque viâ*, the defendant's second notice of intention to surrender was good, and I should have come to this conclusion, if the only fixing of fair rents had been in 1883 and 1884.

Andrews, J., while making this one ground of his decision, has also held that the second fixing of fair rents gives a fresh start for the period of limitation; and in this Fitz Gibbon, L.J., concurs. Without saying I differ from them, I desire to reserve this point for further consideration.

In the foregoing observations I have not referred to the provision relating to the 20 per cent. reduction, as it does not affect the matters discussed, and I only mention it, lest it be supposed that it has escaped my notice.

Solicitors for the plaintiff: *Barrington & Son.*
Solicitor for the defendant: *T. W. Kilpatrick.*

R. D. M.

K. B. Div.
1903.

Oct. 30.
Nov. 6.

FRENCH *v.* MITCHELL (1).

(1902. No. 8170.)

Landlord and tenant—Holding sublet—Judgment in ejectment for non-payment of rent—Liability of middleman for arrears of rent—Land Law (Ireland) Act, 1896 (59 & 60 *Vict. c.* 47), *sect.* 12.

A judgment in ejectment for non-payment of rent recovered by a superior landlord, where the entire holding is in the hands of sub-tenants, and the middleman does not redeem, discharges the middleman, in the case of holdings to which section 12 of the Land Law (Ireland) Act, 1896, applies, from personal liability for the arrears of rent due by him to the superior landlord.

Quære—What is the effect of the section where only part of the holding is sublet, or where there are a series of sublettings one under another?

Motion to set aside judgment for defendants and enter judgment for plaintiffs, or for a new trial.

The action was brought to recover the sum of £137 2*s.* 6*d.* arrears of four several rents claimed to be due down to the 1st November, 1900, out of four separate parcels of land held by the defendants of the plaintiffs under four leases. The holdings were holdings to which the Land Law Acts, as defined by section 48 of the Land Law (Ireland) Act, 1896, applied. The entire of all the holdings had been sublet by the defendants. On the 2nd January, 1901, the plaintiffs obtained decrees in ejectment for non-payment of rent in the County Court against the defendants and their sub-tenants in respect of all the holdings. The Court did not certify in any of the cases that the non-payment by the defendants was due to the non-payment of rent by their sub-tenants. The defendants did not redeem any of the holdings.

The action was tried before Kenny, J., without a jury. The defendants, amongst other defences, relied on sect. 12 of the Land Law (Ireland) Act, 1896; and Kenny, J., held that, on the construction of that section, the rent sued for was not recoverable

(1) Before Lord O'Brien, L.C.J., and Gibson and Madden, JJ.

from the defendants, and gave judgment for the defendants with costs.

Fleming, *K.C.* (with him *T. H. Maxwell*), for the plaintiffs:—

Section 66 of the Landlord and Tenant (Ireland) Act, 1860, gives a landlord recovering possession by judgment in ejectment for non-payment of rent the same remedy for arrears of rent as if possession had not been obtained under such judgment. That section has never been repealed. Section 12, sub-sect. 2, of the Land Law (Ireland) Act, 1896, deals merely with rights and relations as between the superior landlord and the sub-tenant. The superior landlord becomes immediate landlord to the sub-tenant, and may proceed "accordingly" for the recovery of all rent due by the sub-tenant to the immediate landlord. Proceed "accordingly" must mean proceed against the sub-tenant, and the words following, "but . . . not for the recovery of the rent due to the superior from the immediate landlord," which were probably inserted *ex abundanti cautelâ*, only mean that such rent cannot be recovered in the action against the *sub-tenants*. The object was to protect the sub-tenant, not the middleman. Suppose the middleman owes five years' rent and the sub-tenant owes only six months, is the effect that the superior landlord can only recover the six months' rent due by the sub-tenant to the middleman?

Wakely, *K.C.*, and *W. G. Jefferson*, for the defendants:—

Section 66 of the Landlord and Tenant (Ireland) Act, 1860, was not expressly repealed, because it is of general application, applying to non-agricultural as well as agricultural holdings. The provision in section 12, sub-sect. 2, of the Land Law (Ireland) Act, 1896, that the superior landlord may not proceed for the recovery of the rent due to the superior from the immediate landlord, cannot be restricted to mean that he is not to proceed against the sub-tenant for such rent, since the sub-tenant was never liable for it.

T. H. Maxwell, in reply.

Cur. adv. vult.

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Nov. 6.

LORD O'BRIEN, L.C.J. :—

This case, in no way complicated in its facts, and confined in the narrowest compass, involves an important question as to the true construction of the 12th section of the Land Law (Ireland) Act, 1896.

A, a head landlord, brings an action for rent against B, who is a middleman, after the middleman has been evicted for non-payment of rent, there being no fraud or collusion, or letting at a gross undervalue. What then is the 12th section of the Act of Parliament? [His Lordship read the section.] Now this is the section, and as regards the state of facts with which we are dealing the important words are "but (except in the case of fraud, collusion, or a letting at a gross undervalue) not for the recovery of rent due to the superior from the immediate landlord." The case not being within the exception, there being no fraud, collusion, or letting at an undervalue, the immunity of B, the middleman, is, in my opinion, complete. He is discharged from liability. Mr. Fleming and Mr. Maxwell contended that the direction that the middleman shall not be sued—in other words, that the words "not for the recovery of the rent due to the superior from the immediate landlord" meant simply that, as between superior landlord A, and occupying tenant C, in a proceeding between A and C, the rent due from B, the middleman, to A, the superior landlord, should not be recoverable, but that, as between A and B, and in a proceeding between them, the liability of B remained untouched. If that construction were to prevail, it would be ascribing to the Legislature the doing of what was unnecessary, for there was no liability on the part of C, the occupying tenant, for B, the middleman's debt.

The words "but not for the recovery of the rent due by the immediate to the superior landlord" are quite general in their character, and appear to me to mean that in no case, save those specially excepted, can the middleman be sued. Once the relation of landlord and tenant is, by force of the section, created directly between the superior landlord and occupying tenant, the elimination of the middleman from the holding, in the state of facts before us, carries with it for the middleman,

save in the cases specially excepted, an immunity from legal responsibility.

I think my brother Kenny's ruling, in the state of circumstances before us, was right, and that accordingly judgment should be for the defendant, with costs of the trial and the appeal.

GIBSON, J.:—

The question raised in this case is whether a judgment in ejectment for non-payment of rent, under sect. 12 of the Act of 1896, where the holding is all in the hands of sub-tenants, discharges the middleman from personal liability for arrears accrued previous to the forfeiture of his estate. The construction of the section is beset with difficulty.

When does the statutory destruction of the tenancy take place? Under the previous law the tenancy continued till the execution of the *habere*, or the completion of the statutory notices under sect. 7 of the Act of 1887. Section 12, sub-sect. 1, on its obvious construction determines the middleman's estate by virtue of the judgment itself without more. Is the machinery of sect. 7 of the Act of 1887 superseded? If that section applies, the tenancy would not be determined till the completion of the statutory posting, and the period for redemption would commence from that date, and not from the recovery of the judgment. The middleman cannot have two periods of redemption assuming different times for the determination of his estate, one as to the part in his own possession, one as to the part sublet. The ejectment is entire, and must determine the tenancy in the entire holding, once for all, at the same time. This point, which might be material in this case if no notices were posted, was not argued. The difficulty is not noticed in *Craig* v. *M'Culloch* (1). That case was decided on an *ex parte* application, and the reasons are not given in the report.

What is the effect of sub-sect. 2 where part of the holding is in the hands of the middleman and is not sublet? The subletting might be trivial. Does the superior landlord, by bringing the ejectment, lose all personal remedy against the middleman from the accident of part being sublet? Can there be an apportionment of the rent due, between the portion in possession and the

(1) [1900] 2 I. R. 136.

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portion sublet? And would such apportionment be on the basis of the proportionate values of those respective parts or on the proportion of the sub-rent to the immediate rent? The sub-section is silent as to any apportionment.

What is to happen where there are two or more sublettings, and the series consists not of three, but of four or more sets of persons? A, the superior ejecting landlord, might have let to B, who might have sublet to C, who in turn might have sublet to D. There is apparently nothing in the sub-section to prevent B from suing C for his arrears. This may perhaps be accounted for by the sub-section being directed against the evicting landlord only. But how is the final clause of the sub-section to be worked out in the case of such a series? A might have let to B at £10, B to C at £20, and C to D at £40. If A can under the sub-section recover £40 from D, is he to pay £30 to B, and has C no right to anything? Or has he a common law remedy against B? The enactment appears to contemplate only a series of three—that is only one subletting.

The object of the sub-section is on the one hand to protect the occupying sub-tenant if the non-payment grounding the ejectment is not due to his default, and on the other to substitute the superior landlord for the middleman, whose interest in the sub-tenants' arrears is retroactively transferred to the superior landlord. This transfer explains, if it may not entirely justify, the forfeiture of the latter's personal remedy against the middleman, save where the exception applies. If the arrears due to the middleman exceed the arrears due by him, it would not be unreasonable that such middleman should be exonerated from personal liability. But the justice of this is not so clear where there are in fact no such arrears due by the sub-tenant, or where such arrears are less than the amount due to the superior landlord. Though, however, the sub-section specifically deals with the case of the sub-tenants' arrears exceeding the middleman's, and being paid to the superior landlord, it takes no notice of the obvious case of there being no such arrears, or their being insufficient in amount, or their being irrecoverable. The landlord, therefore, who, instead of suing for his rent as a debt, elects to enforce his right to possession, must now enforce that specific remedy subject to the new onerous condition of

losing all direct personal remedy against the middleman for his rent.

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Plaintiffs' counsel did not dispute that all sub-tenants' arrears (if any) were vested in the superior landlord. Their entire argument is that sub-section 2, in prohibiting proceedings, where the exception does not apply, to recover rent due from the middleman to the superior landlord, refers to proceedings against the sub-tenant for such arrears. As the sub-tenant never was personally liable for the middleman's debt, such prohibition would be meaningless. The suggested construction, which is quite opposed to the language used, overlooks what was the obvious reason of the extinguishment of the middleman's personal debt—namely, the transfer of the sub-tenants' rents, together with the forfeiture of the middle interest.

Whatever difficulties may affect the construction of the section, and whatever criticism may be directed against the justice of its provisions, I have no doubt that on the assumption (admitted by counsel) that the holding was entirely sublet, and that the defendants' estate was determined *ipso facto* by the judgment, the plaintiffs fell within the express prohibition of sub-section 2, and cannot recover arrears of rent previously due by defendants as owners of the extinguished estate. The judgment of my brother Kenny was right, and must stand.

MADDEN, J.:—

I agree that difficulties may be found in applying the provisions of the section under consideration to a different state of facts. But they appear to me to be reasonably clear for the purposes of a case in which we have to consider three interests only—(1) those of the superior landlord; (2) of the "immediate landlord," whom I shall call the middleman; and (3) of the occupying tenant.

Prior to the passing of the Land Law Act of 1896, the superior landlord could proceed against his tenant, the middleman, either by action of debt for the recovery of the rent due by him, or in the event of one year's rent being due, by action of ejectment for the recovery of the land, and in the latter action he could recover all arrears due within the statutory limit of six years.

It is to be borne in mind throughout the consideration of the

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section before us, that it does not in any way affect the rights of the head landlord if he should prefer to bring an action of debt against the middleman. This procedure will be usually adopted where there is a reasonable prospect of recovering the rent by means of such an action, and the 12th section will rarely be brought into operation unless, in the opinion of the head landlord, an action of debt against the middleman is likely to prove fruitless.

In construing this section we must attribute to the Legislature an intention to give effect to the settled policy of recent land legislation. The existence of estates in land intermediate between the fee and the interests of the occupying tenant is recognised as a grave public mischief, against which not only the Subletting Acts, but the 15th section of the Act of 1881, had been directed, and the policy of rooting the occupying tenant in the soil is, I need hardly say, the principle underlying recent land legislation. Accordingly we find it enacted that the recovery of a judgment against the intermediate owner is to be ordinarily followed by two consequences—first, the complete disappearance from the scene of the obnoxious middleman, with his estate and his liabilities; and secondly, the preservation of the interest of the favoured occupier, with a kind of statutory attornment to the head landlord, and a transfer to the latter of the right to recover "all rent due from the tenant to the immediate landlord." Here again it is to be borne in mind that the middleman may, if it should suit him so to do, preserve his interest and prevent the operation of the section, by exercising his right to redeem. If the section had stopped here, the head landlord might have proceeded under the section for the recovery of all rent due from the tenant to the middleman, and in addition he could have sued at common law for the recovery of rent due to him by the middleman. To prevent this anomaly and injustice, the section enacts that his procedure is "not" to be "for the recovery of the rent due to the superior from the immediate landlord."

It is suggested that these words prohibit the recovery from the occupying tenant of rent due not by him, but by the middleman. I should hesitate to attribute to the Legislature so manifest an absurdity as the prohibition of an action that could by no possibility be brought, even if such a construction were necessary to

give effect to the general policy of the section. So far from this being the case, the words, taken in their plain ordinary sense, appear to be necessary in order to give effect to the section, and to prevent the consequences to which I have referred.

So far I have considered the section in its ordinary operation as applied to the case of head landlord, middleman, and occupying tenant. The exceptions recognised by the section seem to place the general policy in a clearer light. The occupying tenant loses the boon which he would otherwise have secured, in the event of the Court certifying that his default was the cause of the eviction of his immediate landlord; and the middleman does not escape from liability to the superior landlord, if he is found guilty in some proceeding not exactly defined—presumably in an action for the rent—of fraud or collusion with the occupying tenant, or of letting to him at a gross undervalue. Where these exceptional circumstances do not exist, the middleman is squeezed out, and the occupying tenant is continued in his holding.

But there are possible cases, different from the ordinary one with which we are dealing, for which the section makes no provision. Suppose a small portion only of the middleman's estate to be sublet, does he escape an eviction for the entire rent? In such a case there would probably be a statutable apportionment of the rent payable by the middleman, although the statute is silent on the subject. Again, it has been pointed out that the section contemplates the interposition of a single estate only between the fee and the interest of the occupying tenant. It is a matter of common knowledge that under the system of subletting which prevailed in this country, several estates—I have known as many as five—have been carved out of the fee-simple, most frequently by means of leases with *toties quoties* covenants for renewal. Whether it is possible to apply this section under such circumstances, and if it be possible so to do, how the mutual relations of the several intermediate landlords are to be regulated, are questions to be asked, but to be answered in another case. In its application to the facts before us the language of the section is, to my mind, explicit, and I therefore agree that the motion should be refused with costs.

Solicitor for the plaintiffs: *William Bridge.*

Solicitors for the defendants: *A. Mitchell & Son.* J. G. T.

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Dec. 8, 11.

THE KING (BYRNE) *v.* DIVISIONAL JUSTICES OF DUBLIN (1).

Licensing Acts—Certificate for renewal of spirit grocer's or beer retailer's license—Service of notice of intention to apply for—Certiorari—*Discretion of Court to grant or refuse—Beerhouses (Ireland) Act*, 1864 (27 & 28 *Vict. c.* 35), *s.* 4—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 82—*Beer Retailers' and Spirit Grocers' Retail Licenses (Ireland) Act*, 1900 (63 & 64 *Vict. c.* 30), *s.* 1.

The provisions of sect. 4 of the Beerhouses (Ireland) Act, 1864, requiring a person applying for the certificate from the magistrates necessary for the renewal of a beer retailer's or spirit grocer's license, to give twenty-one days' notice in writing of the application to the police, are mandatory, both as to the giving of the notice and the length of notice, and if not complied with the magistrates have no jurisdiction to grant the certificate. These provisions are not impliedly repealed by sect. 1 of the Beer Retailers' and Spirit Grocers' Retail Licenses (Ireland) Act, 1900.

On an application for a writ of *certiorari* to quash an order of the Divisional Justices of the Dublin Metropolitan Police District granting such certificate, on the ground that the notice of the application was some days short of twenty-one days, it appeared that the practice of the Divisional Justices for years past had been to treat a reasonable notice, though short of twenty-one days, as sufficient, and in some cases to dispense with the notice altogether:—

Held, that this practice was no ground for refusing the *certiorari*, although a matter to be taken into consideration on the question of costs.

CERTIORARI.

At the Annual Licensing Petty Sessions for the Police District of Dublin Metropolis, held on Wednesday, the 7th October, 1903, in pursuance of the Order in Council of the 2nd February, 1875, appointing the first Wednesday in the month of October in each year for the holding of such sessions, John Loughrey was an applicant for the certificate requisite to enable him to obtain a renewal of a Spirit Grocer's and Retail Beer and Wine License in respect of his premises, 19 Commons-street, in the city of Dublin.

(1) Before ANDREWS, GIBSON, KENNY, and BOYD, JJ.

Notice in writing of the intention to make the application had been served on the Superintendent of Police of the district on the 21st September, 1903, and on the 26th September notice of opposition to the granting of the application was served by the police upon the applicant, the ground of opposition alleged being "no notice of renewal served." When the application came on before the Divisional Justices, counsel on behalf of the police contended that inasmuch as the applicant had not given twenty-one days' notice required to be served on the police before the day duly constituted by the Order in Council for the holding of the Annual Licensing Sessions, the Justices had no jurisdiction to hear the application, and that the due service of such twenty-one days' notice was a condition precedent to the jurisdiction of the Court attaching. The certificate of renewal was granted, the Chief Magistrate intimating that, in his opinion, the Court could entertain an application for a renewal certificate, notwithstanding short service or no service of the notice, and could, at all events, adjourn the sessions, so as to admit of twenty-one days elapsing before the hearing of the application. The prosecutor, the Superintendent of Police, obtained a conditional order for a writ of *certiorari* to remove, for the purpose of being quashed, the order of the Justices, on the ground that the twenty-one days' notice required by 27 & 28 Vict. c. 36, s. 4, to be served on the Superintendent of Police by the applicant, was not served in accordance with the requirements of that statute. Loughrey, in an affidavit, filed by way of cause, stated that having had a verbal communication from the police authorities that it was necessary to serve the usual notice, he went to the office of his solicitor between three and four weeks before the holding of the Annual Licensing Petty Sessions, and instructed his solicitor's clerk to serve such notice as was necessary to apply for the certificate. That he was subsequently informed by the clerk that the notice was not served till the 21st September, as he (the clerk) did not know that twenty-one days' notice was essential, and believed that all that was required was to give notice a reasonable time beforehand, so that the police would have knowledge of the application, and not be misled in any way. That the clerk told the deponent, and he believed, that it had for years past been the practice of the magistrates in Dublin

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to treat a reasonable notice, such as that given, as sufficient, and that the police had hitherto acquiesced in that practice. That when the application came before the magistrate, counsel raised the objection that the notice had not been served twenty-one days beforehand, and the magistrate stated that inasmuch as the police had hitherto accepted the said practice, and by their adoption of it led applicants and their advisers to believe that their requirements would be satisfied with a reasonable notice, he did not see his way to uphold their objection, which, even if well founded, was purely technical, and had not caused the police any surprise. That the magistrate also stated that in many cases no notice at all had been served, and that the police even in such cases had not objected, unless the omission had put them at some disadvantage in dealing with the application, and that no suggestion of that kind was made in the present case.

The present application was on behalf of the prosecutor to make the conditional order absolute, notwithstanding cause.

Cecil Atkinson (with him *The Solicitor-General, Campbell, K.C.*), for the prosecutor :—

By sect. 82 of 35 & 36 Vict. c. 94, no renewal is to be granted of a spirit grocer's license, unless a certificate of the nature mentioned in the section is produced, signed, in Dublin cases, by a Divisional Justice of the district in which the person resides, and all applications for such certificates are to be made as prescribed by the Beerhouses (Ireland) Act, 1864 (27 & 28 Vict. c. 35), in relation to applications for certificates under that Act. By sect. 4 of the latter Act every person applying for a certificate under the Act must, in Dublin cases, give twenty-one days' notice in writing to the Superintendent of Police of his intention to make the application, setting out certain particulars. Section 5 of the same Act authorises the Superintendent of Police to object before the Divisional Justices to the issue of the certificate. These certificates can only be granted at the Annual Licensing Sessions: 45 & 46 Vict. c. 34, s. 2; 63 & 64 Vict. c. 30, s. 3. By an Order in Council dated 2nd February, 1875, made under the powers conferred by section 12 of 37 & 38 Vict c. 69, the first Wednesday in October in each year was appointed for holding the Annual Licensing

Petty Sessions of the Dublin Metropolitan Police District. In the present year this fell on the 7th of October, and the notice of the intention to apply should have been served twenty-one days before that date, and not having been so served, the Justices had no jurisdiction to grant the certificate. The provisions as to the service of the notice are mandatory: *Reg.* v. *Riley* (1).

W. G. Gibson, for John Loughrey:—

The provisions of sect. 4 of 27 & 28 Vict. c. 35, are directory merely: *R.* v. *Justices of Penkridge Division of Staffordshire* (2). Further, these provisions are impliedly repealed by sect. 1 of 63 & 64 Vict. c. 30, which enables the Justices "in their free and unqualified discretion" to grant the certificate "notwithstanding anything in any Act." At all events where, as here, the practice has long prevailed of accepting a reasonable notice, though less than twenty-one days, this Court should refuse to grant *certiorari*; in a case such as this the writ is not of right, but the Court may exercise its discretion as to granting it: *R.* v. *Nicholson* (3).

The Solicitor-General, in reply:—

The existence of an erroneous practice is no ground for refusing the writ of *certiorari*; we come here to have a legal decision upon the point. There is no authority for a provision of this kind being held to be other than mandatory in an Act passed to regulate the liquor traffic. The words relied on in sect. 1 of 63 & 64 Vict. c. 30, can only apply where the applicant is properly before the Justices; here the service of the twenty-one days' notice was a condition precedent to the jurisdiction of the magistrates: *R.* (*Gallagher*) v. *Justices of County Tyrone* (4).

Cur. adv. vult.

Dec 11.

ANDREWS, J.:—

On the 6th of November last the prosecutor, Patrick Byrne, a Superintendent of the Dublin Metropolitan Police, obtained a conditional order for a writ of *certiorari* to remove

(1) 53 J. P. 452.
(2) 56 J. P. 87.
(3) [1899] 2 Q. B. 455.
(4) 1 N. I. J. R. 42.

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into this Court to be quashed, an order made at the Annual Licensing Petty Sessions for the Police District of Dublin Metropolis, held on the 7th October last, granting to John Loughrey the certificate requisite to enable him to obtain a renewal of a spirit grocer's and retail beer and wine dealer's license in respect of his premises, 19 Commons-street, in the city of Dublin. The want of jurisdiction to make the impeached order which was specially referred to in the conditional order, was that the twenty-one day notice required by the Act, 27 & 28 Vict. c. 35, s. 4, to be served on the Superintendent of Police by the applicant was not so served.

The case came before this Court on a motion by counsel, instructed by the Chief Crown Solicitor, on behalf of the prosecutor, to make absolute the conditional order, notwithstanding the cause shown by John Loughrey, and the question argued on the hearing of the motion was whether the short service of the twenty-one day notice deprived the magistrate, who made the impeached order, of jurisdiction to grant the certificate applied for.

The facts, as appearing from the affidavits of the prosecutor and the applicant showing cause, so far as it is necessary to refer to them, were, that the prosecutor attended at the sessions referred to, and on behalf of the police opposed Loughrey's application, on the ground that the requisite twenty-one days notice had not been served. Timely notice was given to the applicant that this objection would be made. A notice had in fact been served on the 21st September, which, if it had been served in time, would, as I assume, have been sufficient, but it was, by some four or five days, short of the twenty-one day notice referred to in the 4th section of the Licensing Act of 1864, 27 & 28 Vict. c. 35.

Amongst the certificates referred to in that section, the certificate which is requisite to authorise a renewal of such a license as the one in question, in a case within the Dublin Metropolitan Police District, is a certificate, signed by a Divisional Justice of the district in which such person resides, to the good character of the applicant, and the suitability of his premises, and in certain cases to the peaceable and orderly manner in which the licensed house had been conducted for the past year (see sect. 3 of the

Licensing Act of 1864, and sect. 82 of the Licensing Act of 1872). By sect. 4 of the Act of 1864 it is enacted that every person who shall apply for any such certificate as is therein referred to shall give twenty-one days notice in writing (if in the Dublin Metropolitan Police District) to the Superintendent of Police of the division in which such person resides, stating the intention of such person to make such application, and setting forth the particulars mentioned in that section. By the 5th section of the same Act the Superintendent of Police, in a Dublin case, is authorised to object at the Licensing Sessions to the issue of the certificate, and the Justice is required to proceed to consider, examine on oath into, and adjudicate upon, the truth, sufficiency, and validity of the objection made, and if satisfied thereof, this section proceeds to enact that he "may refuse to grant such certificate." Having regard to these provisions, I think it clear, and it has not been disputed, that if the Justice is satisfied of the truth, *sufficiency*, and validity of the objection, his duty is to refuse to grant the certificate, and that the word "may" is to be interpreted in an obligatory, as distinguished from a merely permissive sense, and further, that if the objection goes to his jurisdiction to grant the certificate, and is sustained, he has no option in the matter, but is bound to refuse to grant the certificate.

Resuming the statement of the facts, an order duly published in the *Dublin Gazette* was made on the 2nd of February, 1875, by the Lord Lieutenant in Council, under the power conferred by the 12th section of the Licensing Act of 1874, constituting the first Wednesday in the month of October in each year to be the time for holding Annual Licensing Petty Sessions for the Police District of Dublin metropolis. This fell upon the 7th of October in the present year, and the twenty-one day notice, which ought to have been given pursuant to the 4th section of the Act of 1864, was a notice twenty-one days prior to that date. The short service of the notice was apparent, and was not disputed. The prosecutor's affidavit states that the Divisional Justice, who was the Chief Magistrate, intimated that in his opinion the Court could entertain the application, and the certificate applied for was issued. The affidavit of the applicant states that the short service of the notice arose through the mistake of his solicitor's clerk, and

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that he believes it has been the practice of the magistrates in Dublin for years past to treat a reasonable notice as sufficient, and that when the objection was raised the magistrate stated that as the police had hitherto accepted this practice he did not see his way to uphold the objection, and that in many cases no notice at all had been served, and that even in such cases the police had not objected unless the omission had put them to some disadvantage in dealing with the application, and that no suggestion of that kind was made in this case. I have shortly summarized these affidavits, which were read at length at the hearing before us.

After carefully examining and considering the Licensing Act of 1864, and the provisions of the other Licensing Acts which require notices to be given similar to the twenty-one day notice required by the 4th section of the Act of 1864, I entertain no doubt that the enactment in this section relating to the giving of the twenty-one day notice is mandatory, and that compliance with it is a condition precedent to the exercise of the jurisdiction to grant the certificate. That the notice which was required by the Legislature to be given was not a matter which might be dispensed with, is, in my opinion, unquestionably clear, and it is equally clear that the reason for requiring notice to be given was to enable the person to whom it was given to make the necessary inquiries to ascertain whether there was any objection to the application for a certificate on any of the various grounds on which a valid objection could be made. The Legislature prescribed and fixed twenty-one days as the length of the notice. Proper inquiries might in some cases require considerable time, and although more time might of course be required in some cases than in others, the Legislature fixed twenty-one days as the length of notice to be given in all cases. I do not feel at liberty to substitute "a reasonable time" for the fixed period of twenty-one days. To do so would be to alter the Act, and would introduce great uncertainty in the proceedings of every Licensing Sessions in Ireland. What the Justices at one sessions might think a reasonable time, the Justices at another sessions might not think reasonable. There not only might, but probably would, be much diversity of opinion on this question both at Licensing Sessions for different districts, and at successive

Licensing Sessions for the same district, and there might be frequent disputes as to whether the notice was given within a reasonable time or not. The importance and advantage, therefore, of having a fixed time for the notice in all cases are obvious, and I am of opinion that the 4th section of the Act of 1864 is mandatory both as regards the giving of the notice and the time within which it is thereby required to be given, and that the mandatory requirements of this section not having been complied with by the applicant in this case, the magistrate had no jurisdiction to grant the certificate applied for.

It was submitted, however, on behalf of the applicant that even if the Court should come to the conclusion I have arrived at as regards the 4th section of the Act of 1864, still, having regard to the facts of this case, including the practice which was referred to of treating what might be regarded as a reasonable notice to be sufficient, this Court might exercise a discretion, and refuse to grant the writ of *certiorari*, which in this case, it was submitted, was not a writ of right. It may be that the Court would have jurisdiction in this case to refuse to grant the writ, but even assuming that it *could* exercise a discretion in this case as to allowing the writ to issue, I am of opinion that this is a case in which it ought not to refuse the writ. The reason the writ was applied for in this case was to have an erroneous, and highly inconvenient and unsatisfactory, practice corrected, and the law laid down in order that it should be uniformly observed throughout Ireland. The short service of the notice in this case appears to have arisen through the mistake of the solicitor's clerk, to whom the applicant entrusted the management of his application, and who it appears afterwards told the applicant that he did not know that twenty-one days notice was essential, and believed that all that was required was to give notice a reasonable time beforehand. It does not appear that the clerk relied on, or knew of, the existing practice, but whether he did or not, I am of opinion that in a case of this general importance, brought forward for the purpose of correcting an erroneous practice attended with so many objections, including an embarrassing uncertainty, we ought not to leave an order made without jurisdiction undischarged, although what has been addressed to us on the question

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of discretion in allowing the writ may be taken into consideration on the question of costs.

The only other matter I wish to refer to, lest it should be supposed to have been overlooked, is whether the recent Licensing Act of 1900 (63 & 64 Vict. c. 30) has impliedly repealed the provisions of sect. 4 of the Act of 1864, and rendered the twenty-one day notice prescribed thereby no longer necessary. After a careful consideration of the provisions of the Act of 1900, I am of opinion that the specific and particular provisions of the 4th section of the Act of 1864 (so obviously salutary and proper, and against which no complaint of hardship, or difficulty in complying with them, can reasonably be made, or, so far as I know, has ever been made) are not impliedly repealed by the general words of the Act of 1900, but remain in force.

The far-reaching effect of holding that there was such an implied repeal would go far beyond a mere repeal of the provisions in the 4th section of the Act of 1864, and involve results which I would find it impossible to regard as having been within the intention of the Legislature. The motion to make absolute the conditional order for the issue of the writ of *certiorari* therein mentioned will therefore be granted, but under the circumstances without costs. The order to be now drawn up will provide for the quashing of the impeached order without further motion.

I may be permitted to mention one other matter. So long ago as the year 1833 the licensing laws had got into a condition similar to their condition at the present day. It was recited as follows in the 1st section of the Licensing (Ireland) Act, 1833, that "whereas the laws for regulating the conduct of persons licensed to sell wine, spirits, beer, ale, and cider by retail in Ireland, to be drank or consumed on the premises, have become very numerous and complicated, and it would greatly tend to the public benefit to amend and simplify the same, and for that purpose to collect into one Act the several regulations and provisions thereof." It appears to me that what was stated in that recital is applicable to a great extent to the condition of the Licensing laws as they at present stand, and that what was done in 1833 might be very usefully done again in 1904.

GIBSON, J.:—

Like the notice of application in respect of a malicious injury under the Grand Jury Act, sections 11 and 135, required to be posted at every police station, the notice to vary a tithe rentcharge required to be affixed on the principal door of the parish church, the notice before application under the Wine and Beerhouse Act, 1869, section 7, *Reg* v. *Pownall* (1), and the notice under our Act of 1833, section 2, *The Tyrone Case* (2), the notice prescribed in the Beerhouses (Ireland) Act, 1864, is plainly mandatory, and it would seem to constitute a condition precedent to the magistrates' jurisdiction. The notice precedes and is independent of the proceedings before the Justices; they have no jurisdiction to adjudicate on the sufficiency of the notice, or to relax the operation of the statutory condition.

The case is not one where the Court in the exercise of discretion ought to decline to make the order absolute and thereby enable the spirit grocer to trade under a void licence: *Lambe's Case* (3).

The Act of 1900, which enlarges the scope of objection, and gives the Licensing Justices an unqualified discretion, does not by implication repeal sections 3 and 4 of the Act of 1864, as the object of the notice is not limited to the police officer being the sole competent objector. If section 4 is in force, it clearly applies, under section 82 of the Act of 1872, to the spirit grocer's application: *The Antrim Case* (4).

As the application was heard before twenty-one days had elapsed from the service of the notice, it is unnecessary to consider whether *Pownall's Case* (1), deciding that under the English Act, 1869, the time is computed from the day on which the application is actually heard, could be extended to our legislation.

KENNY, J.:—

I concur in the conclusion at which the other members of the Court have arrived, and for the reasons given by my brother Andrews.

(1) [1893] 2 Q. B. 158.
(2) [1901] 2 I. R. 497.
(3) [1897] 2 I. R. 57.
(4) [1901] 2 I. R. 135.

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Mr. Justice Boyd authorises us to say that he also concurs.

Solicitor for the prosecutor: *Sir Patrick Coll.*
Solicitor for John Loughrey: *Matthew J. Brady.*

J. G. T.

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July 1. Nov. 24.

IRISH LAND COMMISSION *v.* BROWN (1).

Landlord and tenant—Land Law (Ireland) Acts—Redemption of Rent Act, 1891—Tithe rentcharge—Liability of tenant after fair rent fixed.

The grantee or tenant under a fee-farm grant, after an order under the Redemption of Rent Act, 1891, fixing a fair rent upon his holding, still remains liable to tithe rentcharge.

The Irish Land Commission v. *Magorian* ([1901] 2 I. R. 445) approved.

APPEAL from an order of the King's Bench Division, dated the 30th day of April, 1902, whereby the question raised by a special case stated by Lord Justice Fitz Gibbon on the hearing of civil bill appeal at the Fermanagh Assizes (Spring), 1902, was answered in the affirmative.

The special case was as follows:—

1. The civil bill in this action was brought to recover £1 11*s.* 6*d.* claimed to be due by the defendants to the plaintiffs, as successors in title of the Church Temporalities Commissioners in Ireland, for three years' tithe rentcharge up to November 1, 1901, payable out of the lands of Drumhariff, in the parish of Cleenish, in the county of Fermanagh.

2. It was heard by the County Court Judge at Enniskillen on January 24, 1902, and he gave a decree for the sum claimed with costs. The civil bill is annexed and incorporated herewith.

3. The defendant appealed, and the appeal came on for hearing before me as Judge of Assize at Enniskillen on March 10, 1902. Mr. Horner, counsel for plaintiffs, and Mr. Bird, counsel

(1) Before FITZ GIBBON, WALKER, and HOLMES, L.JJ.

for the defendant, applied to me to state a case for the King's Bench Division, stating that the facts were not disputed: that the liability of the defendant was a question of law, and it depended upon the effect of the decision of the King's Bench Division in the *Irish Land Commission* v. *Magorian* (1), and the decisions of Monroe, J., the Master of the Rolls, and the Court of Appeal referred to therein, which the defendant's counsel alleged to be in conflict with the decision of the King's Bench Division. Counsel having given me a dominical signed by them setting out these facts, I directed a special case to be stated accordingly, as the question was, in my judgment, proper to be decided by the King's Bench Division, and if necessary by the Court of Appeal. At the request of the parties, I did not consider the question. It was agreed that the costs of the civil bill appeal and of the special case should abide the result, save as to any costs which might be incurred in the Court of Appeal, which should abide the order of that Court, and that there should be no expenses of witnesses.

4. The lands of Drumhariff were held under a grant or lease for ever, dated January 23, 1787, from James Hall to David Gamble, a copy whereof is annexed and incorporated herewith.

5. The interest of James Hall was in 1899, and still is, vested in S. R. Bowles and James Macraith, and the interest of David Gamble then was, and still is, vested in William James Brown the defendant, who is in occupation of the lands.

6. On March 3, 1899, the defendant duly served an originating notice under the Redemption of Rent (Ireland) Act, 1891, to redeem his rent, or to fix a fair rent upon his holding, and the said S. R. Bowles and James Macraith did not consent to such redemption, whereupon proceedings were duly taken, which resulted in an order of the Land Commission made by a Sub-Commission, dated February 25, 1901, whereby the defendant was declared to be deemed to be a tenant of a present tenancy in the said holding, and the fair rent thereof was fixed and determined to be £32 per annum. The particulars of the said holding as required by the provisions of section 1 of the Land Law (Ireland) Act, 1896, were ascertained and recorded in a schedule of even date

(1) [1901] 2 I. R. 445.

Appeal. 1902.

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referred to in the said order, and the grantors required that the right of sporting as mentioned in the Land Law (Ireland) Act, 1881, should belong exclusively to them. The said order and schedule are annexed and incorporated herewith.

7. No mention of any tithe rentcharge was made in the said order or schedule: the existence of, or liability to, tithe rentcharge was not taken into consideration in fixing or determining the fair rent of £32 per annum: no deduction was made in fixing the said fair rent on account of any tithe rentcharge payable to the Land Commission or otherwise.

8. All the tithe rentcharge claimed or recoverable in this action is to be taken to have accrued after the said order fixing the fair rent at £32 came into operation, the question of law which I was asked to state being exclusively conversant with the effect upon the defendant's liability of the said order, and the proceedings relating thereto.

9. The defendant is to be taken to be liable to pay the amount claimed, and the lands are to be taken to be chargeable therewith, unless the said order, and the proceedings relating thereto, had and have the effect of relieving him from such liability, or of showing that in law he is not so liable, or that the lands are not chargeable therewith.

The question for the opinion of the Court is:—Whether, having regard to the order of the Land Commission, and the schedule therein referred to, and the other facts and evidence, the defendant is liable to pay the Land Commission the tithe rentcharge claimed in this action accruing after the said order came into operation?

If the above question be answered in the affirmative, the decree of the County Court will be affirmed with costs. If it be answered in the negative, the action will be dismissed on the merits with costs; the costs in the High Court and the costs (if any) in the Court of Appeal will be awarded in accordance with the terms agreed upon by the parties as stated in paragraph 3 of the foregoing case, upon the decision of the question being communicated to the Judge of Assize. Dated, etc.

The King's Bench Division having by their order of 30th April, 1902, answered the above question in the affirmative, this appeal was taken from their decision.

Henry, K.C., and *J. W. Bird*, for the appellant :—

The tithe rentcharge is payable by the person having the first estate in inheritance in the lands charged therewith (1 & 2 Vict. c. 109, s. 7). The appellant had such an estate in inheritance until his fair rent was fixed. But since the fair rent was fixed he has only a chattel interest, and not an estate of inheritance in the lands: *Morony* v. *Ambrose* (1); *In re Gray*; *Gray* v. *Gray* (2). [WALKER, L.J.: That was a case of an *estate pur autre vie*, which had been mortgaged by a deed which contained a covenant to reconvey to the tenant, "his executors, administrators, and assigns." Would not this covenant alter the character of the estate quite apart from the Land Law Acts?] In *In re Parke, Munster Bank* v. *Parke* (3), *In re Ruttledge's Estate* (4) was cited; but the decision of Monroe, J., therein was not followed by the Vice-Chancellor. This case was cited to the Master of the Rolls in *M'Evoy* v. *M'Evoy* (5), but notwithstanding it the learned Judge held that the owner of a freehold lease by fixing a fair rent for his holding converted his interest into a chattel, so that on his death intestate his interest therein passed not to his heir, but to his administrator. *Connolly* v. *Tyrrell* (6) is an authority to show that if the tenant of any lease within the Act of 1887 fixes a fair rent he converts his leasehold into a tenancy from year to year: to the same effect is *Smyth* v. *Moore* (7); these cases logically follow *Sturges* v. *Ryan* (8), where it was held that after fixing a fair rent under the Act of 1887 in respect of a leasehold, the tenant acquires the position of a present tenant from year to year, and the lease is to be treated as having expired. *Mairs* v. *Lecky* (9) shows that there is no difference in the case of a fee-farm grant; there is an imputed expiration of the grant, and an imputed yearly tenancy

(1) 32 L. R. Ir. 63.
(2) [1894] 1 I. R. 65.
(3) 1 Ir. Weekly R. 168.
(4) [1895] 1 I. R. 328.
(5) [1897] 1 I. R 295.
(6) 32 L. R. Ir. 97.
(7) 32 L. R. Ir. 129.
(8) 24 L. R. Ir. 305.
(9) [1895] 2 I. R. 475.

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substituted. In *Glenny* v. *Bell* (1), Lord Ashbourne, C., and Holmes, L.J., expressed concurrence in the view that the fee-farm grantee by fixing a fair rent under the Redemption of Rent Act destroys the fee-farm grant. We submit that *In re Ruttledge's Estate* (2) and *The Irish Land Commission* v. *Magorian* (3) cannot be sustained. The former case is not consistent with *Morony* v. *Ambrose* (4), which was not cited in the arguments or judgment, and is the decision of a Divisional Court, and *The Irish Land Commission* v. *Magorian* (3) simply follows *In re Ruttledge's Estate* (2). Besides it appears in the facts of that case that a deduction was made from Magorian's fair rent on account of his having to pay tithe rentcharge.

The Solicitor-General (*Campbell, K.C.*), and *Ronan, K.C.* (with them *Horner*), for the respondents :—

The decision in *Ruttledge's Estate* (2) is a direct authority in our favour. It was followed in *The Irish Land Commission* v. *Magorian* (3). These two cases were binding on the King's Bench Division, and in obedience to them the question asked by this case was answered by the Court below in the affirmative. We submit these decisions are right. The direction that a lessee or fee-farm grantee "shall be deemed to be" or "held to be" a tenant of a present tenancy from year to year, means only so far as necessary for the purpose of fixing the fair rent. They are not really made tenants from year to year, so as to alter their liabilities to third parties, owners of tithe rentcharge, etc. But for the purpose of fixing a fair rent they are to be treated as between them and their landlord as if they were yearly tenants : *Hill* v. *East and West India Dock Co.* (5) ; *Ex parte Walton* ; *In re Levy* (6). If the fee-farm grantee is no longer owner of the fee-simple estate in the lands, where has that estate gone to? It has not been conveyed to anyone. It cannot be without an owner. For no purposes other than those connected with the relation of landlord and tenant is there an imputed yearly tenancy : for all other purposes the estate of inheritance remains in the tenant who has fixed the

(1) [1898] 2 I. R. 233.
(2) [1895] 1 I. R. 328.
(3) [1901] 2 I. R. 445.
(4) 32 L. R. Ir. 63.
(5) 9 A. C. 448.
(6) 17 Ch. D. 746.

fair rent, and there is attached to this estate of inheritance the liability to pay the tithe rentcharge. Kenny, J., in *The Irish Land Commission* v. *Magorian* (1), has analysed the cases cited by the appellants from *Sturges* v. *Ryan* (2) to *Mairs* v. *Lecky* (3), and has shown that it is only as against the landlord that they decide that the statutes impute to the tenant the notional yearly tenancy.

It must be observed that the Field Book kept by the Assistant Commissioners who fixed this fair rent shows that they gave the tenant a deduction on account of his being liable to tithe rentcharge, though no doubt there is an error made in not recording this fact in the Pink Schedule. The universal practice is to make an allowance to the tenant in such cases following *Ruttledge's Estate* (4).

Cur. adv. vult.

Nov. 24.

FITZ GIBBON, L.J.:—

This is an action by civil bill brought by the Land Commission, as the successors of the Church Temporalities Commissioners, to recover three years' tithe rentcharge from the occupying tenant of the lands of Drumhariff, county Fermanagh. The lands were held under a fee-farm grant, or lease for ever, dated January 23, 1787, and in 1899 the grantee's or lessee's estate and interest were vested in the defendant; being in *bona fide* occupation and holding at a full agricultural rent, he applied under the Redemption of Rent Act, 1891, to redeem his rent. The lessors or grantors did not consent to such redemption, and thereupon, by an order of the Land Commission, dated February 25, 1901, the defendant was declared to be deemed to be a tenant of a present tenancy in the holding, and the fair rent thereof was fixed at £32 per annum.

The Special Case which we have to consider was stated by consent and at the request of both parties, and upon the terms appearing therein:—that all the tithe rentcharge claimed should be taken to have accrued after the order fixing the fair rent came into operation, and that the defendant should be taken to be liable

(1) [1901] 2 I. R. 462.
(2) 24 L. R. Ir. 305.
(3) [1895] 2 I. R. 475.
(4) [1895] 1 I. R. 328.

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to pay the amount claimed, and that the lands should be taken to be chargeable therewith, unless the "fair rent order" and the proceedings relating thereto had the effect (*a*) of relieving him from such liability, or (*b*) of showing that in law he is not so liable, or (*c*) that the lands are not chargeable therewith. Each of these alternatives must be considered under the peculiar circumstances stated in the case, namely, that no mention of any tithe rentcharge was made in the fair rent order, or in the schedule recording the particulars prescribed by the Act of 1896, sect. 1 (1); that the existence of or liability to tithe rentcharge was not taken into consideration in fixing the fair rent; and that no deduction was made in fixing the said fair rent, on account of any tithe rentcharge payable to the Land Commission or otherwise.

If the Land Commission, when fixing the fair rent, had appreciated the nature of tithe rentcharge as affecting the letting value of land, and had taken it into account in determining the amount of the rent, and had recorded in the statutory schedule how the tithe rentcharge had been dealt with, this case could not have been stated as it is, and a decree could have been made which would have imposed the charge upon the person who in justice ought to bear it. Tithe rentcharge is the commuted equivalent of tithe—an interest in the land which belonged neither to landlord nor to tenant, but which was paramount to both. Chargeability to tithe rentcharge is plainly a circumstance affecting the amount of rent, for the sum of the interests of both landlord and tenant is, in effect, liable to a deduction for the tithe rentcharge, and even if a mistake were made, when fixing the fair rent, in treating the charge as payable by the wrong party, if the charge had been recorded as having been put either on the landlord or on the tenant, I see no reason to doubt that effect could have been given to the terms upon which the amount of the rent had been ascertained. Certainly this case would not have been stated in its present terms.

But, however this may be, we must now decide whether the defendant has been relieved from a liability which he must otherwise have paid, by the fixing of a fair rent upon his holding. The main, if not the only, argument on his behalf is that the tithe rentcharge is by law charged upon the first estate of inheritance—

that this estate, so long as the fee-farm grant or lease for ever existed, was in the tenant, but that the order fixing the fair rent put an end to that estate, turned the tenant's interest into a tenancy from year to year, converted the landlord's estate into the first estate of inheritance, thereby made him liable to pay the tithe rentcharge, and at the same time relieved the tenant from it.

This train of reasoning has been recently considered by the King's Bench in *Magorian's Case* (1), and from a different point of view, or rather for a different purpose, by the Master of the Rolls in *M'Evoy's Case* (2), and these authorities are supposed to be in conflict. The view of the King's Bench is supposed to be supported by the opinions of O'Brien, J., in *Wilson* v. *Smith* (3), and of Monroe, J., in *Ruttledge's Estate* (4). On the other hand, the Exchequer, in *Morony* v. *Ambrose* (5), the Vice-Chancellor, in *Gray* v. *Gray* (6), and a *dictum* of Holmes, L.J., in *Glenny* v. *Bell* (7), are cited in aid of the opposite view. The nature and incidents of the estate which a grantee or lessee has in land on which a fair rent has been fixed under the Redemption of Rent Act, 1891, and the operation upon the freehold of an order fixing such fair rent, are obscure, and have been debated in an abstruse if not metaphysical manner. The determination of such questions may affect valuable rights, and must affect the devolution and incidents of the tenant's property in the holding. A final decision, so vitally affecting absent parties, ought not to be pronounced now, if it is unnecessary for the decision of the question upon this special case, stated by the parties to a civil bill action for £1 11*s.* 6*d.* As I am clearly of opinion that an order fixing a fair rent upon a perpetual tenancy under the Redemption of Rent Act, 1891, does not *per se* relieve the tenant from liability to tithe rentcharge, which he would otherwise be bound to pay, we must not be taken as giving any decision beyond that, or even as expressing any final opinion, upon other questions about the devolution, character, nature, or incidents of the tenant's estate, or about his *status*, or

(1) [1901] 2 I. R. 445.
(2) [1897] 1 I. R. 295.
(3) 23 I. L. T. R. 7.
(4) [1895] 1 I. R. 328.
(5) 32 L. R. Ir. 63.
(6) [1894] 1 I. R. 65.
(7) [1898] 2 I. R. 233.

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the effect, for other purposes, of fixing a fair rent under the Act of 1891.

At the same time, the inclination of my own opinion is to regard the principle and the *modus operandi* of such an order under that Act as the substitution of a variable valued rent for the previous perpetual contract rent, leaving all other incidents, both of the landlord's and of the tenant's interest, so far as is consistent with the express provisions of the Land Acts, as they were before. I am inclined to think that the Act does not operate by transfer or alteration, either of estate or of liability, when it enacts that "*the lessee or grantee* . . . shall be *held to be* a tenant of a present tenancy *in manner* . . . mentioned in sect. 21 of the Act of 1881, as modified by sect. 1 of the Act of 1887, and his holding shall be subject to the provisions of the said Acts *with regard to present tenancies.*" This appears to me to treat him as still a lessee or grantee, but with an estate or interest *as such*, which is only *sub modo* "held to be" a present tenancy, while his holding is expressly made "subject to the provisions of the Land Acts with regard to present tenancies, without being itself made a present tenancy."

In my opinion, "deeming clauses," such as this, do not essentially alter the subject of them, nor make it something which it was not before. They merely, for the purposes of the enactment, impute to the subject such attributes and incidents of something else as are required to effect the object of the legislation. This principle of interpretation is supported by the authority of the English Court of Appeal in *Walton's Case* (1), approved by Lord Cairns in *Hill's Case* (2).

When a fair rent is fixed, I do not agree that the grant disappears, for it still regulates the terms of the tenancy, so far as may be consistent with "the provisions of the Land Acts with regard to present tenancies." To prevent the possibility of misunderstanding, I must observe that nothing which I have said defines or limits the effect of the "fair rent order" upon the estate or interest of "the lessee or grantee" with respect either to the statutory conditions or to any of the other statutory incidents

(1) 17 Ch. D. 746. (2) 9 A. C. at p. 456.

of present tenancies which are extended by the Act of 1891 to holdings upon which fair rents are fixed under that Act.

But this, at least, is, in my opinion, clear, and it is enough to decide this case, that the fixing of a fair rent by an order which took no account of the liability of the tenant to tithe rentcharge did not (*a*) relieve the tenant from it, nor (*b*) show that he was not liable to it: *a fortiori*, it did not transfer the liability to the landlord, and, therefore, unless (*c*) the lands are no longer chargeable therewith, and the tithe rentcharge has ceased to be recoverable by the Land Commission, it must remain payable by the tenant, as it was before.

This third contention, viz. (*c*) that the lands are no longer chargeable, has something to be said for it. The omission by the Land Commission to take the tithe rentcharge into consideration when fixing the fair rent ought to have increased the amount of that rent, and this might make it just to estop the Land Commission from suing for it, because it had treated the lands as tithe free when fixing the rent. But the right to recover the tithe rentcharge is vested in the Land Commission in a different capacity, under different statutes, and for different purposes; and even a mistake of the Land Commission as a rent-fixing authority, in fixing the rent for the statutory term of fifteen years, could not forfeit property, or debar a right of suit, vested in the Land Commission as the Public Trustee of Church Temporalities.

It is satisfactory, however, to know from the Solicitor-General, though we are, perhaps, not at liberty to act on his statement, that there was no mistake, except in omitting the tithe rentcharge from the schedule, and that the Sub-Commissioners who fixed the rent at £32, knew of the tithe rentcharge, and noted it in their field book as payable by the tenant. This only makes the omission of it from the statutory schedule the more unaccountable. But for that omission, this case would not have been stated, and, while all the other costs must abide the result, as agreed in paragraph 3 of the case, the Land Commission ought to abide its own costs of this appeal.

The question on the case should, in my opinion, be answered in the affirmative.

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WALKER, L.J. :—

In this case, one William James Brown was owner in fee-simple of the lands of Drumhariff, subject to a rentcharge, payable to S. R. Bowles and others. The grant under which the lands were owned and the rentcharge payable is dated 23rd January, 1787.

Brown, the owner in fee and owner of the first estate of inheritance, was liable to a tithe rentcharge vested in plaintiffs.

Brown, under the combined provisions of the Redemption of Rent Act, 1891, and 14th section of the Act of 1896, obtained on the 25th February, 1901, an order from the Land Commission, whereby he was declared to be a tenant of a present tenancy in the lands, and the fair rent was fixed at £32.

The plaintiffs have sued for tithe rentcharge, which accrued subsequently to that order, and the question is whether it affords a defence.

The existence of the tithe rentcharge was not taken into account, or considered by the Land Commission, in fixing the fair rent. No alteration of liability to it, or transfer of liability, was thought of. The rent was fixed on the assumption that the party before liable to the tithe rentcharge should continue to bear it; but it is said the tithe rentcharge is payable by the person having the first estate of inheritance, the tenant ceased to have that when the order to fix the fair rent was made, and therefore, in point of law, the tenant is no longer liable to it as between him and the other owner.

The question, therefore, which we have to consider is whether this liability to parties not before the Land Commission was destroyed or transferred from the parties liable, by virtue of the order fixing the rent. It has been held, in two considered decisions not appealed from, that it was not so destroyed or transferred, and the contention of the defendants is that those two decisions of *Ruttledye's Estate* (1) and *Irish Land Commission* v. *Magorian* (2) are inconsistent with *M'Evoy* v. *M'Evoy* (3), and *dicta* in *Glenny* v. *Bell* (4), and must be overruled by us.

I think the legislation which was designed to enable the owner in fee subject to a rentcharge to adjust it as between

(1) [1895] 1 I. R. 328.
(2) [1901] 2 I. R. 445.
(3) [1897] 1 I. R. 295.
(4) [1898] 2 I. R. 245.

him and the party entitled to receive it, had not the effect of destroying or altering the liability to or incidence of charges and incumbrances on the fee outside the scope of the fair rent proceedings, and not taken into account there. It is sufficient for the purposes of this case to limit the effect only so far. The manner in which the charge is imposed by the Tithe Rentcharge Act is also important in this connection. There is an object which the statutory fiction—for that is the form of legislation—was designed to accomplish. Lord Cairns, in *Hill* v. *East and West India Dock Company* (1), adopts with approval the language of James, L.J., in *Ex parte Walton* (2), "when a statute enacts that something shall be deemed to have been done which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purpose and between what persons the statutory fiction is to be resorted to." I understand the reasoning of Lord Cairns to be that in cases where the words "deemed to be," or like words, are used in reference to the carrying out of a particular object or purpose, the construction of the Act will be limited to that particular object whenever a more literal construction would affect the rights or property of third persons.

The whole difficulty in the present case has arisen from the language in which the several extensions of the subject of fair rent in the Act of 1881 have been made. That subject was a present tenancy from year to year, and the four extensions of that subject-matter being—(1) the 21st sect. of the Act of 1881, (2) the Act of 1887, (3) the Redemption of Rent Act, (4) the 14th section of the Act of 1896, are all made by deeming the subjects additionally legislated for to be, for the purpose of attracting the fair rent provisions of the Act of 1881, the present tenancy with which the Act of 1881 was primarily conversant. By the 21st section the lessees therein mentioned at the expiration of their existing leases are to "be deemed to be tenants of present ordinary tenancies from year to year." The second extension is made by enabling lessees, including ones with a more extended tenure than mentioned in the 21st section, to anticipate the expiration of their leases by fixing at once a fair rent. The words are, "such lessee shall be deemed to be a tenant of a present tenancy,

(1) 9 A. C. at p. 456. (2) 17 Ch. D. 746.

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in like manner, and subject to like conditions, and subject to the same right of resumption as if his lease had expired, and his holding shall be subject to all the provisions of the said Act of 1881, with regard to present tenancies, as if the tenancy therein were a tenancy from year to year."

Thus for the purpose of attracting the fair rent provisions into (as I think must follow) the consequences of statutory tenancy and statutory conditions, the lessee is deemed to be what he was not, and the provisions of the Act of 1881 are applied *as if* the tenancy were a yearly one.

The object of this section was to adjust the contract rent between the lessor and lessee to a fair rent. The case of *M'Evoy* v. *M'Evoy* (1) has decided that the result of the process has been to alter, in the case of a freehold lease, the devolution between persons claiming through the tenant after his death. There was no appeal against that decision. I do not consider it an authority governing the present one, which relates to a charge binding the tenant's interest when he went into Court, and vested in persons whom the Land Commission did not even profess to affect.

The third extension is the Act of 1891, to tenants not reached by the Act of 1887, and including a "grantee under a fee-farm grant." The language by which the right to fix a fair rent is conferred is, "The grantee shall be deemed to have made the prescribed application under sect. 1 of the Act of 1887, and shall be held to be a tenant of a present tenancy in manner and subject to the conditions and right of resumption mentioned in sect. 21 of the said Act of 1881, as modified by sect. 1 of the said Act of 1887, and his holding shall be subject to the provisions of the said Acts with regard to present tenancies." Another notional element is here introduced by the making of an application. It is curious that the words in sect. 1 of the Act of 1887, "as if the tenancy there were a tenancy from year to year," are omitted, but it is obvious the design is to bring the tenant named within the class mentioned in the preceding Acts, so as to enable a fair rent to be fixed."

The 14th section of the Act of 1896 goes a step further, and brings into the same class as a tenant *pro hac vice* one who, like the defendant in the present case, was not in law a tenant, but the

(1) [1897] 1 I. R. 295.

owner of the absolute fee, paying a perpetual rentcharge. I reserve altogether my opinion whether in this latter case the devolution of the former fee is altered. It is not the case before us. We have to determine, not how Brown's estate will devolve as between his heir and personal representative, but whether, the full purpose of fixing a fair rent having been served, charges on the inheritance or independent prior interests, such as dower and tithe rentcharge vested in outside persons which had been on the land because it was an estate of inheritance, ceased to exist, or whether those charges remain on the grantee's estate after he had, for the purpose of fixing a fair rent, availed himself of the statutory fiction, and assumed the garb of a present tenant. In my opinion it never can be held, in the absence of express legislation so compelling us, that a transmutation of the tenant's interest from freehold into chattel real, or *vice versa*, could affect or destroy prior charges on, or estates in, the altered subject, especially when the whole transmutation takes place on a legislative fiction introduced for a purpose which is served without involving the destruction or alteration of rights paramount to the interest which is *pro hac vice* clothed with an unreal character. I put aside cases where the order fixing the fair rent is assessed on the basis that the tithe rentcharge shall thereupon be borne by either one party or the other.

Lastly, how does the case stand on authority? In *M'Evoy* v. *M'Evoy* (1) the Master of the Rolls had not to consider the question before us, but there are general observations in his judgment which were naturally pressed as extending to cover it, and the observation of Lord Justice Holmes, in *Glenny* v. *Bell* (2), was used for the same purpose.

As regards *Morony* v. *Ambrose* (3), the real point argued was whether the fixing of the fair rent, while the lease lasted, prolonged the liability beyond the expiration of the lease on 7th June, 1888; but *Ruttledge's Estate* (4) is a precise authority in point, and if the Master of the Rolls, in *M'Evoy* v. *M'Evoy* (1), had intended to decide the point before us, I think he would have noticed Monroe, J.'s, decision. I agree that there are general

(1) [1897] 1 I. R. 295.
(2) [1898] 2 I. R. 233.
(3) 32 L. R. Ir. 63.
(4) [1895] 1 I. R. 328.

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observations in the judgment in *Ruttledge's Estate* (1) inconsistent with the view of the Master of the Rolls, but the decision in *Irish Land Commission* v. *Magorian* (2) is free from that criticism, and, if rightly decided, rules this case. I am satisfied to adopt the reasoning of Madden and Kenny, JJ., in the case. In *Glenny* v. *Bell* (3) I foresaw during the argument that such a question as that before us would arise, and therefore avoided the discussion of *M'Evoy* v *M'Evoy* (1), and the consequences which might follow from the observations of the Master of the Rolls, if pressed to their logical conclusion.

Upon the whole, I am of opinion that the grantee remained liable to the tithe rentcharge after and notwithstanding the fair rent order.

HOLMES, L.J.:—

This case was discussed on the hearing of the appeal as if its decision depended upon whether the order of the Land Commission fixing a fair rent for the holding had the effect of converting the appellant's interest, which had previously been an estate in fee-simple, into a chattel tenancy. It seemed to be assumed by counsel on both sides that if this was the result of the order the appellant would thenceforth cease to be liable to pay tithe rentcharge; and little, if any, reference was made to the view taken by Madden, J., in *The Irish Land Commission* v. *Magorian* (2), that a grantee in a fee-farm grant who had a fair rent fixed would still be liable to tithe rentcharge, even although his legal status, not only as between himself and his landlord, but also for certain purposes outside those with which the Land Code is primarily concerned, is that of a tenant from year to year.

In *Glenny* v. *Bell* (3) I considered somewhat elaborately the status of a grantee in a fee-farm grant who is entitled to have a fair rent fixed under the Redemption of Rent (Ireland) Act, 1891. I traced the legislation relating thereto, and endeavoured to show that he is placed in precisely the same position as a lessee is placed in by the 21st section of the Act of 1881, on the expiration of his

(1) [1985] 1 I. R. 328.
(2) [1901] 2 I. R. 445.
(3) [1898] 2 I. R. 233.
(4) [1897] 1 I. R. 295.

term, and that his right to have a fair rent fixed is based thereon. I deduced, as the result of the several provisions of the Land Code on this subject, that once the grantee has a fair rent fixed, all the terms of the grant disappear, except such of them as are applicable to a tenancy from year to year, and are not inconsistent with the statutory conditions. I still adhere to the opinion I then expressed.

The effect of the order seems to me to make the grantee a tenant from year to year with a fair rent fixed, while the grantor, who had previously been only entitled to a rent issuing out of the lands, has vested in him the fee-simple of the lands subject to the tenancy. This, however, is not brought about by a transfer of the grantee's interest to the grantor, and the creation in the former of a new interest. The statute does not contemplate a transfer or creation of estates. The change is effected by taking away from the grantee's interest all the legal characteristics of a fee-simple estate, and by substituting therefor the incidents of a present yearly tenancy held under the grantor, for which a fair rent has been fixed.

I know that this view differs from that expressed by Monroe, J., in *Ruttledge's Estate* (1), and by Kenny, J., in *The Irish Land Commission* v. *Magorian* (2), but it is in accordance with the judgments of the Vice-Chancellor in *Gray* v. *Gray* (3), and Porter, M.R., in *M'Evoy* v. *M'Evoy* (4), which I understand have been since acted on by the Chancery Division in the administration of the assets of intestates.

I have been led by the arguments addressed to us to dwell a little upon this branch of the case, and in respect to what I said in *Glenny* v. *Bell* (5), but I confess that I regard the matters to which I have referred as being only distantly connected with the question reserved for our consideration. The character of the tenant's estate after the order fixing a fair rent is one thing; the liabilities attaching to it are another. If, previous to the order, he had charged the lands with a rentcharge in favour of third parties, or if he had mortgaged or otherwise encumbered his interest, these

(1) [1895] 1 I. R. 328.
(2) [1901] 1 I. R. 445.
(3) [1894] 1 I. R. 65.
(4) [1897] 1 I. R. 295.
(5) [1898] 2 I. R. 233.

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burdens would continue to attach, notwithstanding the alterations in the nature and incidents of his tenure. No one would venture to suggest that such charges would be transferred to the landlord's estate; and it would, in my judgment, be equally unreasonable to hold that the liability to tithe rentcharge to which the interest of the tenant had been subject was shifted therefrom through the operation of the fair rent order. I doubt not that this idea originated from applying a provision of the statute 1 & 2 Vic. c. 109, to a state of circumstances which is within neither its language nor intention. Section 9 of the Act contains the proviso that in case of the forfeiture, surrender, or other determination of any estate or interest, the owner whereof may be liable to the payment of such rentcharge as aforesaid, the party having the first estate of inheritance, or other equivalent estate or interest, as before described, in remainder or reversion, shall become liable to the said payment of such rentcharge, provided also that in case of any such devolution of interest no more than the amount of one year's arrear of rentcharge shall be a charge on the lands subject to the payment thereof. Section 7 had already declared that the rentcharge was to be payable by the party having in the lands the first estate of inheritance, or other estate or interest equivalent to a perpetual estate or interest, as thereinafter defined, and sect. 8 enacts that any estate or interest held under a deed or contract for the perpetual renewal thereof, or any estate held for a term of years whereof one hundred were unexpired at the 30th October, 1838, or held under an ecclesiastical lease, shall be deemed to be equivalent to a perpetual estate or interest. This section further provides that a tenant in dower, or by curtesy, or a person having, under the limitations of a settlement, an estate for life or other particular estate created or limited out of or in any estate of inheritance, or out of or in any such equivalent estate as thereby defined, shall be, during his interest, liable to the payment of the rentcharge. Viewed in the light of these sections, the object and scope of the proviso in section 9 are perfectly clear. The estates and interests declared to be deemed to be equivalent to a perpetual estate or interest are all liable to come to an end, and be merged in the inheritance by efflux of time, forfeiture, surrender, ejectment for non-payment of rent, and other ways. So, too, every par-

ticular estate limited out of an estate of inheritance will disappear sooner or later. The language of the proviso shows that it is intended to meet cases of this kind. It speaks of the forfeiture, surrender, or other determination of an estate or interest, and of any such devolution of the interest. What is contemplated is the interest, whose owner was liable to the rentcharge, ceasing to exist; and I am of opinion that it does not apply to such a case as is now under consideration, where the grantee's interest in the lands continues, subject only to certain modifications in its nature and incidents. The only objection I can see to this solution of the question reserved for the Court is its simplicity. It was not referred to when this subject was discussed on former occasions; and yet the point seems to me to be too obvious to be overlooked. It may be possible to reply to it satisfactorily; but as I have not been able myself to find an answer, I am satisfied to rest on it my concurrence in the judgment of the Court.

Solicitors for the plaintiffs: *Alexander Irvine & Co.*
Solicitor for the defendant: *G. A. Bird.*

G. Y. D.

Appeal.
1903.

BROWN *v.* WATSON (1).

Nov. 12, 13.
Dec. 14.

Landlord and tenant—Lease of licensed premises—Covenants—To preserve the license—To assign and transfer the license at the end of the term to the landlord—Death of tenant—Executrix declining to carry on business, and closing the public-house—Loss of license.

J. W. was tenant of a licensed house at S., in the county of Donegal, under an agreement, dated the 11th February, 1891, for ten years, at the rent of £20, and on the expiration of the term, in 1901, he remained on as an overholding tenant. The agreement contained covenants by the tenant—(1) not to do or suffer any act whereby the license might be forfeited or affected prejudicially, or the renewal might be withheld; (2) that he would do all acts necessary to procure a renewal of the license, and not to assign or sublet the premises without consent in writing; and (3) at the expiration of the term to do all acts necessary for assigning and transferring the then existing license to the nominee of the landlord.

J. W. died on the 26th October, 1902, and by his will he appointed the defendant, his widow, sole executrix. J. W. had a license for the year ending October, 1902, and he had obtained a certificate from the magistrates at the Licensing Sessions for a renewal of that license, but he had not paid the duty. A few days after his death B., one of the plaintiffs, had a conversation with the defendant, when the defendant stated that she would not carry on the business, and intended to surrender the premises. B. stated that it would be necessary to put the premises in repair, which the defendant agreed to do, and pay the duty. The defendant then gave B. the amount of the duty, and asked him to pay it for her, which he agreed to do. B. paid the duty and took out the license in the name of J. W., which he handed to M., a solicitor, who had J. W.'s will in his possession; but M. was not retained or instructed by the defendant. In consequence of M. refusing to give up the will of J. W., probate of the will was not obtained until the 16th December, 1902; but on the 29th November, 1903, M., without instructions from the defendant, obtained an *interim* transfer of the license at Petty Sessions to the defendant. The plaintiffs insisted on the defendant putting the premises in repair, and keeping them open to carry on the business. The defendant refused to open the premises. On the 31st January, 1903, she removed the stock-in-trade, and sent the keys to the plaintiffs, who took possession next day. The plaintiffs took no steps to obtain an *interim* transfer or a new license, although the

(1) Before FitzGibbon, Walker, and Holmes, L.JJ.

defendant offered to do everything necessary to transfer the license. The license was lost.

In an action for damages for breach of the covenant to maintain the license, and transfer it at the end of the term :—

Held (affirming the decision of the King's Bench Division), that the defendant, as executrix or tenant, was not bound to take out a license pending a surrender of the licensed premises, and that her omission to take it out and to carry on the publican's business was not an act done by her, by which the existing license was forfeited.

BY agreement dated the 11th February, 1891, James Brown and Alexander Brown agreed to let to James Watson a licensed house at St. Johnston, in the county of Donegal, for ten years, from the 1st February, 1891, at the rent of £20. Besides the ordinary covenants for payment of the rent, and to repair and keep in repair the premises, the agreement contained the following covenants :—

1. That he shall not do or suffer any act whereby the license for using the demised premises as a public-house may be forfeited or affected prejudicially, or the renewal thereof may be withheld.

2. That he shall, at all proper times, do all acts necessary to procure a renewal of the existing spirit license, and shall not assign, sublet, or part with the possession of the premises, or any part thereof, without the previous license in writing of the landlord.

3. That the tenant, his executors, administrators, or licensed assigns, shall, at the expiration or sooner determination of the term, do all necessary acts for assigning and transferring the then existing license and certificates to the person or persons to be named by the landlords, on payment only of the proportionate part for the current year of the sum paid for the same.

After the termination of the lease on the 1st February, 1901, James Watson remained in possession until his death on the 26th October, 1902. He made a will by which he appointed his widow, the defendant Maria Watson, sole executrix. The will did not contain any power or authority to carry on the business. The rent had been paid up to the 1st August, 1902, the gale day preceding Watson's death. On the 11th October, 1902, Watson obtained a certificate at the annual Licensing Sessions from the Magistrates that the business had been properly conducted on the premises, which would enable him to obtain a license for the year ending the 31st October, 1903, upon payment of the duty ; but he had

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not paid the duty. After his death, Maria Watson, his widow, resolved not to carry on the business, and to surrender the premises as soon as she could. On the day after her husband's funeral, Alexander Brown, one of the plaintiffs, saw Mrs. Watson in her house, and had a conversation with her. He told her that she must put the premises in repair before the plaintiffs would accept a surrender, and also that the duty must be paid on the license. She handed him £7 10*s.*, the amount of the duty, and asked him to pay it for her, which he agreed to do. Brown paid the duty, took out the license in the name of James Watson, and handed it to W. P. Moody, a solicitor in Strabane, who had drawn James Watson's will. Moody had the will in his possession. Mrs. Watson called on Moody and asked him for the will, but he refused to give it up. Mrs. Watson had not retained Moody, or instructed him to act for her.

Some few days after Watson's funeral, Mrs. Watson closed the house, and went to Londonderry. She instructed Samuel Morrison, a solicitor in Derry, to prove the will, but probate was not obtained till the 16th December, in consequence of the action of Moody. On the 8th November, Todd and Mark, the solicitors for the plaintiffs, wrote to the defendant calling on her to put the premises in repair, and hand them over to them with the license; they stated they would take possession, "you meantime keeping the premises open, and carrying on the business so as to preserve the license as provided for by the lease"; and on the 26th November they again wrote threatening proceedings if the defendant did not put the premises in repair, and open them, carry on the trade, and have the license transferred to a properly qualified person, and have the will proved. A long correspondence ensued between the solicitors, the substance of which is set out in the judgment of Fitz Gibbon, L.J., *infra*, pp. 226–9.

The Petty Sessions were held at Raphoe on the 29th November, 1902, at which Moody, purporting to act as solicitor for Mrs. Watson, got an *interim* transfer of the license to her, under the 1st section of 18 & 19 Vict. c. 114. Brown was present on the occasion, but Moody had received no instructions from Mrs. Watson.

On the 14th January, 1903, Brown got the license from Moody,

together with the bill of costs for obtaining the *interim* transfer. Brown sent them on to Todd and Mark, who, on the 15th January, forwarded them to Morrison, but Morrison repudiated any liability of the defendant for the costs.

On the 19th January, 1903, the defendant served notice of surrender of the premises on the 1st August following, and on the 31st January she removed the stock-in-trade, and sent the keys of the house to the plaintiffs. On the 2nd February the plaintiffs took up possession of the house, which had been closed for three months. On the same day Morrison wrote to the plaintiffs' solicitors stating that the defendant was ready and willing to do all things necessary to vest the license in the plaintiffs. No further application for a transfer, either at Petty Sessions or Quarter Sessions, was made by any person.

The plaintiffs sued the defendant for £10 for arrears of rent, and for damages for breach of the covenant in the contract of tenancy, the breaches relied on being—(1) breach of covenant to repair and deliver up in repair; (2) the covenant to maintain and transfer the license. To the claim for rent the defendant lodged the sum of £10, being the full amount claimed; to the claim for breach of covenant, besides pleas in bar, the defendant lodged £190 in Court, on both causes of action. The jury found a verdict for £80 damages for non-repair, and £200 for the loss of the license. The defendant admitted her liability to the damages for non-repair, and the only question between the parties was as to the loss of the license. At the trial Wylie, K.C., asked for a direction, on the ground that there was no evidence that the defendant did, or omitted to do, anything to cause forfeiture of, or prejudicially affect, the license. This was refused, and Johnson, J., in summing up told the jury that the defendant was assignee of James Watson's tenancy, was in law liable to the obligation in the agreement of 1891 to maintain the license, and that inasmuch as the defendant closed and locked up the premises, and did not carry on the business, and never effected the transfer, the right to a renewal of the license was gone, and the measure of damages was the loss to the plaintiffs, by having the house and premises given up to them in the condition that the publican's business could not then be carried on therein. The jury found a verdict for the plaintiffs for

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£200 for the loss of the license, and the Judge entered judgment accordingly.

The defendant moved to set aside the verdict and judgment on the ground of misdirection.

The King's Bench Division set aside the verdict and judgment, and entered judgment for the defendant.

The plaintiffs appealed.

Drummond, K.C., Henry, K.C., and *A. Todd,* for the appellants :—

The closing of the public-house destroyed the license, as it was impossible for the plaintiffs to obtain an *interim* transfer after the defendant had actually obtained one. An *interim* transfer to the defendant having been obtained at Petty Sessions, under the 1st section of 18 & 19 Vict. c. 114, and allowed to lapse through want of confirmation as provided by the 12th section of 37 & 38 Vict. c. 69, it was not competent for the Petty Sessions Court to grant a second *interim* transfer, as the application would not then have been made on the death or removal of any duly licensed person.

Under the new Act a new license cannot now be obtained.

From the wording and frame of sect. 12 of the Act of 1874 it follows that a transfer of a license at Quarter Sessions, under sect. 12 of 37 & 38 Vict. c. 69, cannot be obtained, unless an *interim* transfer under the Act of 1855 has been previously obtained.

The license has consequently been lost owing to the conduct of the defendant, (1) in not getting the transfer confirmed, (2) in keeping the premises closed. The defendant is liable on the covenant to preserve the license in full force : *Fielding* v. *Cronin* (1). If an executor of a lessee enters and takes possession of demised premises, he is liable for breach of covenant : *Rendall* v. *Andreæ* (2), and it is no defence to say that the premises yield no profit : *Tremeere* v. *Morison* (3).

Wylie, K.C., Hume, K.C., and *Osborne,* for the respondent :—

The obligation of the tenant was two-fold—(1) During the

(1) 16 L. R. Ir. 379. (2) 61 L. J., Q. B. 630. (3) 1 Bing. N. C. 39.

term to keep up the license; (2) when the term came to an end to transfer and assign the then existing license to the plaintiffs, or their nominee. The defendant did not commit any breach of the covenant in either branch. It was impossible for the defendant to carry on the business after her husband's death, because there was no power to trade in James Watson's will; but she was not bound to trade, if she chose not to do so. When a publican dies, if the personal representative wants to trade she will get an *interim* transfer under sect. 1 of the Act of 1855, but she will not do so if she does not intend to trade. The defendant is not bound by the act of Moody, who never was her solicitor, and never was instructed by her. If there had been no *interim* license obtained, the defendant could have handed over the premises to the landlords with an endorsement of the license, and then the landlords could have either obtained an *interim* transfer under sect. 1 of the Act of 1855, or a transfer under sect. 12 of the Act of 1874, to themselves or a nominee of their own. Even if the *interim* transfer had been obtained by the defendant, the license was not destroyed, and if the defendant did not get the *interim* transfer confirmed, the license is in existence still. It continued down to October, 1903, and the defendant by the letter of the 2nd February, 1903, offered to do any act to transfer or assign the license to the plaintiffs.

Dec. 14.

The judgment of the Court of Appeal was delivered by—

FITZ GIBBON, L.J. :—

The plaintiffs have sued for £10 arrears of rent, and £500 damages for a breach of a contract of tenancy, in respect of a licensed house at St. Johnston, which James Watson held as tenant to the plaintiffs, under a written agreement dated February 11, 1891, for ten years ending February 1, 1901. James Watson overheld on the terms of the agreement until his death on October 26, 1902. By his will he appointed the defendant Maria Watson, his wife, executrix. She is sued both as executrix and personally.

The cause of action for rent was met by lodging the £10 in Court; the action for breach of contract related to two matters—first, a breach of contract to keep and deliver up the

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premises in good repair; secondly, alleged breaches of contract to maintain and transfer the publican's license attached to the premises. With pleas in bar, the defendant lodged £190 in Court generally on both these causes of action: the jury found a verdict for £80 damages for non-repair; that finding is not disputed. Thus the matter for our consideration is reduced to the alleged breaches of contract in respect of the license. The jury found a verdict for the plaintiffs for £200 damages in respect of the license, and Johnson, J., at the trial gave judgment for the plaintiffs for £90, over and above the sum lodged in Court, with costs.

By the order under appeal, the King's Bench set this verdict and judgment aside, and entered a verdict and judgment for the defendant with costs, directing that out of the sum of £200 lodged in Court, £110 should be repaid to the defendant, and that the balance to which the plaintiffs were entitled, viz. £10 for rent, and £80 for damages for non-repair, should be retained to abide the taxation of the defendant's costs.

In giving the judgment of the King's Bench, the Chief Baron discussed certain questions of pleading, and certain difficulties in holding the defendant personally liable without further findings, but he also dealt with the case upon the merits, and held that there had been misdirection at the trial, and that there was no evidence capable of sustaining a verdict against the defendant, either personally or as executrix, in respect of any alleged breach of contract with regard to the license. We propose to consider the case irrespectively of technical questions of pleading, or of personal or representative responsibility, upon the question whether the plaintiff has proved a breach of the tenant's contract of February 11, 1891, with respect to the license.

This is the tenant's contract:—[The Lord Justice read the covenants in the agreement, *ante*, p. 219.]

This contract bound the tenant, so long as the tenancy lasted, to preserve a valid publican's license; to do nothing whereby that license might be forfeited or affected prejudicially; and at the end of the tenancy to do everything necessary to transfer a then existing license to the landlord's nominee.

If this contract has been broken, no defect of pleading

should defeat the plaintiffs; but if it is not proved by the plaintiffs to have been broken, the defendant is entitled to judgment.

Mrs. Watson had some separate property and a business of her own, and took no part, during her husband's life, in the management of the public-house at St. Johnston, nor at his death did she desire or intend to carry on the publican's business there.

James Watson died on October 26, 1902, and on his death the house was closed; he had a license throughout the year ending in October, 1902, and he had obtained the certificate at the annual Licensing Sessions for a renewal of that license for the year ending in October, 1903, but he had not paid the duty nor taken out the actual license. The plaintiff Alexander Brown deposed that he saw Maria Watson the defendant on the day her husband was buried, and had a conversation with her about her husband's public-house. Both parties seem to have then come to an understanding that the house should be taken up by the landlords, but he told her that it was necessary to have the license duty paid, as that was the day it should be paid. Mrs. Watson handed him the money, and "the license," by which he manifestly meant the certificate for renewal, and she asked him to have the duty paid. He went and paid the duty, and took out the license, which was in the name of James Watson, and thus there was then an existing license, attaching to the demised premises until the annual Licensing Sessions of 1903. But because the licensed person was dead it was not operative, and no one could carry on the business unless and until an *interim* authority to trade, or another license, was taken out by some one.

The crucial question is whether Mrs. Watson as executrix, or as tenant, was bound by the contract of tenancy to take out such an authority or license, pending the surrender of the licensed premises to the plaintiffs, and whether her omission to take it out, and to carry on the publican's business under it, was an act by which the existing license was forfeited or affected prejudicially.

A deplorable game of cross purposes among three solicitors,

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complicated by the action of the plaintiff Alexander Brown, and by the inaction of the defendant Maria Watson, occupied three months after Watson's death, and led to this litigation.

The defendant appears to have been willing to surrender the premises to the plaintiffs as soon as possible, but to have desired not to take up or carry on her husband's business as a publican, nor to incur any personal liability through her dealings with his assets.

The plaintiffs on the other hand desired to get possession of the demised premises; they did not contemplate permitting any assignment or subletting, but they insisted upon getting them up in good repair, or being paid or secured the damages for non-repair, and upon the business of a publican being carried on therein by the defendant Mrs. Watson until the surrender; and they insisted that her closing of the house was a breach of the agreement, and involved forfeiture of the "existing license," or at least such risk of forfeiture as amounted to prejudicially affecting it. The plaintiff Alexander Brown did not give the license, which he had got on paying the duty, to Mrs. Watson until a week or so before November 29, and then handed it to Mr. Moody, who had been James Watson's solicitor, and had his will, but who was not retained by Mrs. Watson, nor authorised or instructed to act for her, at any time after her husband's death. She retained Mr. Morrison as her solicitor, and instructed him to prove her husband's will, but he was delayed in doing so by Moody's refusal to give it up, and the probate was not obtained until 16th December, 1902.

On November 8th, 1902, Messrs. Todd and Mark, solicitors for the plaintiffs, called on Mrs. Watson to put the premises into repair, and hand them over, with the license, to the plaintiffs, saying—"they will arrange to take possession of the premises at such a date as may be suitable to you, you meantime keeping the premises open, and carrying on the business so as to preserve the license as provided for by the lease."

A fencing correspondence followed, Morrison alleging that Mrs. Watson was not the tenant, and Todd and Mark declining to give him a copy of the contract of tenancy until her tenancy

was admitted. On 26th November, Todd and Mark threatened immediate proceedings against Mrs. Watson if she had not the premises put in repair and opened, the trade carried on, the license transferred to a properly qualified person with the assent of the plaintiffs, and the will proved, all before the following Saturday; no notice was taken of this threat, yet Todd and Mark did nothing until Morrison re-opened the correspondence on the 12th January following.

Meantime both Todd and Mark, and Morrison, were trying to get James Watson's will from Moody, to whom Brown unfortunately gave the license, without the authority or knowledge of Mrs. Watson, shortly before the Raphoe Petty Sessions, which were held on November 29, and told him that he should write to Mrs. Watson and get her instructions to apply for the proper order. On November 27, ignoring the inquiries for the will, and not mentioning that he had got the license from the plaintiff, Moody wrote to Mrs. Watson saying that it would be necessary to get her husband's license transferred at Raphoe Petty Sessions on the following Saturday, and asking for instructions by return of post whether he was to apply for the transfer. Mrs. Watson handed this letter to Morrison, who on November 28 informed Moody that he was acting for Mrs. Watson, and that he would apply for a citation to get the will, but he gave him no instructions as to the license, and expressed surprise that he should have written to Mrs. Watson. Moody, notwithstanding, took the license to Raphoe Petty Sessions, and got an *interim* transfer to Mrs. Watson endorsed upon it on November 29. Brown was present when he did so, and having regard to the fact that he had given the license to Moody, had told him to write to Mrs. Watson, and was afterwards furnished by him with the account for the costs of obtaining the transfer, it seems hard to hold that the plaintiff was not Moody's client in that transaction. But there is no evidence that either of them informed Mrs. Watson that the transfer was obtained, until January following.

On December 1, Moody wrote to Morrison, saying nothing about the license, but repudiating his authority to demand the will, and it was only on December 16 that Morrison, at last having obtained the will, got probate for Mrs. Watson.

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The correspondence was then re-opened by Morrison, who on January 12, 1903, wrote to Brown informing him that the will had been proved, and asking him for the license and receipt for the duty paid by him in October, enclosing Mrs. Watson's written authority. On the same day he wrote also to Todd and Mark, repeating his request for a copy of the contract of tenancy. Assuming these to be honest letters, they show that until then Mrs. Watson and her solicitor did not know what had become of the license, and were ignorant of the terms of the contract, and they were also the proper preliminaries to proceeding to surrender the premises and transfer the license to the plaintiffs.

Todd and Mark met the letter to them by a reply on the same day asking Morrison whether he had proved James Watson's will, whether the person entitled to the premises was keeping the house open as a public-house, or whether the license had been forfeited by the neglect of the person entitled, saying that they would be prepared to give the copy of agreement on ascertaining who was entitled to the premises, and on receiving a statement from Morrison that he acted for that person: they required an undertaking from Morrison that the transfer of the license would be obtained, and the premises put in proper repair and delivered up to the landlords on the day after the licensing day of the then coming Sessions. I cannot think this a reasonable letter, or one calculated to expedite a conclusion of the business in hand; it showed that the plaintiff had not told his own solicitors of his dealings with Moody and the license, nor of Morrison's letter to him.

Morrison replied on January 13, that the defendant had taken out probate, and was the person entitled to the premises, but was not keeping the house open as a public-house, and that he had written to Mr. Brown for the license, and to Todd and Mark for a copy of the contract of tenancy, to enable the executrix to dispose of the license and premises according to her estate and interest. With regard to the request for the undertaking, he naturally said:—"You must be very well aware that I could give no undertaking that a transfer of the license will be given at the Sessions."

On January 13 or 14 Brown got the license from Moody,

with a bill addressed to Brown himself for £1 6*s*., the costs of obtaining the *interim* transfer; these he sent to Todd and Mark, who on January 15 sent them to Morrison. This seems to have been the first intimation to Mrs. Watson, or to anyone authorised to act for her, as to what had become of the license from the day of her husband's funeral, when she gave the certificate and the duty to Brown. Morrison on January 16 wrote to Todd and Mark, repudiating Moody and his bill, returning his letter, and telling the plaintiffs solicitors that there was no finality in their method, and that this paltry affair would last a lifetime if they went on as they were doing.

This letter brought the matter to an issue. On January 27 Todd and Mark wrote that Mrs. Watson had entered into possession of the premises and into receipt of the profits, and had determined the tenancy by leaving and locking up the premises on December 2, 1902, thereby doing an act which might cause a forfeiture of the license or the withholding of a renewal, and they thereby required her, through Morrison, to give up the premises forthwith to the plaintiffs. She at once applied for a permit to remove her husband's stock-in-trade; she got it on January 30, removed the stock on January 31, and on the same day she sent the keys of the premises to the plaintiffs solicitors, with a letter stating that they were so sent upon the distinct understanding that the landlords would have no claim in respect of the rent from that date.

On February 2 Morrison closed the correspondence, so far as it is in evidence, by the following letter to Todd and Mark:—

> "Mrs. Watson is ready and willing to hand over the license and certificate of duty paid for the current year, and do all things necessary to vest the license in your clients, or any nominee of theirs, at any time, upon condition that a proportionate part of the license duty is paid or allowed to her in settlement of the rent due by her up to the 31st ultimo."

This is an assertion by implication that the license issued in James Watson's name was then a valid and subsisting license capable of transfer, not forfeited or prejudicially affected by any previous breach of the first clause of the tenant's contract, and it is in terms an offer to perform the second clause of the contract by

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doing all things necessary to vest that license in the landlord's nominee. The position of the plaintiffs, on the other hand, on the correspondence was that the tenant's contract had been already broken, and that the license had been forfeited or so prejudicially affected by the closing of the house that it could not be transferred. They nominated no one, thereby insisting on the position that the license was not in a condition in which it could be vested in the plaintiffs or their nominee, and they brought this action for damages as the only remedy open to them.

Thus the real question in the case is seen to be this—whether on January 31, when she surrendered the premises, Mrs. Watson was disabled, by a previous breach of the tenant's contract, from transferring the license, or doing acts which would have enabled the plaintiffs thereupon to obtain a license as "transferees," as distinguished from being only able to apply for a license for themselves as "new beginners" without the benefits which, if Clithero's case be law, attach to the position of a "transferee."

The position taken up by Todd and Mark throughout the correspondence was held by the plaintiffs counsel in pleading and at the trial; they alleged that, under the agreement, Mrs. Watson was bound to open the public-house after her husband's death, and to carry on the business without interruption until she was able to surrender the premises and transfer the license attached to the plaintiffs; and to enable her to do this, that she was bound to take out in her own name, first, on her husband's death, an *interim* transfer under the Act of 1855, and then, at the January Quarter Sessions, to take out a fresh certificate and license under the Act of 1874. In other words, the plaintiffs case is that, by keeping the house closed from October to January, and doing nothing about the license, Mrs. Watson broke the contract of tenancy and forfeited the license.

At the trial the plaintiffs counsel put their contention in the form that as the defendant "paid the license duty, but did not effect a complete transfer of the license to herself or to any person, and as the premises had been shut up for months, and she had determined her interest in the tenancy, no transfer could afterwards be made to carry on the business in the house to which she had no title, and no new license could be granted owing to the

Act of last year." It is now said that the Act of 1902 does not apply to the case, but Johnson, J., told the jury that:—

> "The defendant was assignee of James Watson's tenancy, was in law liable to the obligation in the agreement of 1891 to maintain the license, and that inasmuch as the defendant closed and locked up the premises, and did not carry on the business, and never effected the transfer, the right to a renewal of the license was gone, and the measure of damages was the loss to the plaintiffs by having the house and premises given up to them in the condition that the publican's business could not then be lawfully carried on therein."

It was upon this instruction that the damages were measured at £200.

We are all of opinion that, in any view of the case, this was misdirection, tending to mislead the jury as to the amount of damages, because even if there had been a breach of the contract of tenancy the plaintiffs might, in our opinion, still have taken a transfer of the license from Mrs. Watson, and applied for an *interim* transfer, and subsequently for a license for themselves, and the utmost measure of damages would have been the depreciation, if any, of the value of their prospect of obtaining such a license. As they deliberately abstained from nominating any one to apply for the license, the damages might be only nominal, unless by breach of the tenant's contract the license had been, as the plaintiffs contended, absolutely forfeited.

But was any breach proved?

The necessity for continuously carrying on the publican's business as a condition of keeping up a license arises from the necessity of producing at each Annual Licensing Sessions a certificate that the business has been conducted in a peaceable and orderly manner during the past year. But it is quite settled that it is not necessary to keep the business going throughout the year without any interruption. Interruptions by death, bankruptcy, fire, rebuilding, alteration, and other causes, constantly occur; and whenever the licensed person dies, becomes bankrupt, or assigns the premises, the business cannot be carried on until either an *interim* transfer under the Act of 1855, or a new license at Quarter Sessions under the Act of 1874, sect. 12 (1), is obtained.

In our opinion it is impossible to hold that upon the death or

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bankruptcy of a licensed person, his executors or assignees must take out an *interim* license, or must carry on the business in their own names for any period whatever. The Act of 1855 enables the Justices at Petty Sessions, upon death, removal, sale, or assignment by operation of law, or otherwise, to transfer by endorsement the license to any person not disqualified by law. The assignee of an executor, or a purchaser from assignees in bankruptcy, or from a previous assignee, or from the licensed person, may get such an *interim* transfer without any intervening license having been taken out. This *interim* license, as it is called, is merely an authority to carry on the business until the Quarter Sessions next after the expiration of one calendar month from the time of transfer, and no longer. Furthermore, the Justices at Petty Sessions can exercise the power of granting such a transfer only "at any time when no Quarter Sessions shall be holden." A personal representative cannot carry on business except at his own peril, unless authorised by will so to do. No person is under any obligation to take out the temporary license which the Act of 1855 provides; any one may, if he wishes, wait until the Quarter Sessions at least. The Act of 1874, sect. 12 (1), enables the Quarter Sessions, in case any license shall have been transferred to any person under the Act of 1855, and in such other cases as may seem fit to the Justices or Recorder, to give a certificate under which a license may be granted that will continue in force until the next Annual Licensing Sessions. Under this section, if Mrs. Watson had been informed of the *interim* transfer, she might have given notice and applied for a certificate at the January Quarter Sessions, under which a license might have been granted which would have enabled her to carry on the business until the assignment to the plaintiffs was completed. But we cannot see that she was bound to do so. What amount of interruption of the business will amount to sufficient ground for refusing an *interim* transfer under the Act of 1855, or a temporary license under the Act of 1874, sect. 1 (1), or a license to a transferee at the Annual Licensing Sessions, must, in each case, be decided by the licensing authority on legal grounds and on reasonable consideration of the facts. As an executrix, unless specially authorised, cannot trade with the

assets except on a personal responsibility which she is not bound to undertake, and which the correspondence shows that Mrs. Watson did not desire to undertake, the temporary interruption of the trading, pending the completion of the surrender of the premises to the plaintiffs, was quite consistent with the honest intention to preserve the licensed character of the premises, and substantially to carry on the publican's business in them during the year. Provided she acted with reasonable diligence, and in a reasonable manner, in assigning the premises to some proper person—namely, to the plaintiffs or their nominee—and was on the completion of that assignment ready and willing to transfer her husband's license for the year ending in October, 1903, she was not bound to take out an *interim* transfer, or a temporary license, in her own name, and her omission to do so was not in itself a breach of the contract of tenancy.

The conduct of the plaintiff Alexander Brown, in dealing as he did with the license, and with Moody, and the course taken by his solicitors throughout the correspondence, contributed to the delay which took place, but if, on January 31, besides taking up the premises, the plaintiffs had taken over the license which Morrison offered to transfer to them, and if they had then applied either for an *interim* transfer to themselves or a nominee, or had applied to the next Quarter Sessions for a certificate to obtain a license to carry on the business until the following October, though it might be for the licensing authority to decide whether they would grant the application or not, the application would still be one which might have been granted, and if it had not been granted, the refusal could not have been legally or reasonably put upon the ground of any breach of the contract of tenancy by Mrs. Watson.

If any objection had been raised by reason of the endorsement of the *interim* transfer to Mrs. Watson, it would probably have been met by explaining the circumstances under which that endorsement had been put on, especially as Mrs. Watson had offered to do everything necessary on her part to vest the license in the plaintiffs or their assignees. But in any case, the plaintiff Alexander Brown, and Moody acting on his instructions, and not Mrs. Watson, were answerable for that endorsement.

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Accordingly, we arrive at the conclusion, upon the whole case, that no breach of the contract of tenancy forfeiting or prejudicially affecting James Watson's license has been proved against the defendant, that the judgment of the King's Bench was right, and that the appeal must be dismissed with costs.

Solicitors for the plaintiffs: *Todd & Mark.*
Solicitor for the defendant: *Samuel Morrison.*

R. D. M.

K. B. Div. 1903. Nov. 3, 4, 20. *Appeal.* 1904. Feb. 1, 2, 8.

COPE AND OTHERS *v.* GABBETT (1).

(1902. No. 15,564.)

Landlord and tenant—Land Law (Ireland) Act, 1881—*Statutory term—Present tenancy—Lease created between passing of the Land Act,* 1881, *and the 1st January,* 1883—*Contracting out—Ejectment on the termination of the lease—44 & 45 Vict. c.* 49, *ss.* 4, 5, 8, 20, 22, *and* 57.

The defendant was tenant from year to year to the plaintiff of certain lands at the date of the passing of the Act of 1881. Prior to 1st January, 1883, the defendant took a lease from the plaintiff of these lands for a term of twenty-one years, from 21st November, 1881. The lease contained a covenant by the lessee, contracting himself out of the provisions of the Act of 1881. In 1896 the defendant took proceedings to have a fair rent of his holding fixed; the landlord contended the lands were demesne lands, and opposed the application; the Sub-Commission fixed a fair rent; the landlord appealed, on the ground that the lands were demesne. It transpired that the aggregate of the tenant's holdings were valued at above £150, but the Land Commission refused to allow the landlord to amend the notice of appeal so as to raise the question on the contracting out clause, and fixed a fair rent. On the expiration of the lease the landlord instituted an action to recover possession of the lands:—

Held, by the Court of Appeal (affirming the decision of the King's Bench Division, Lord O'Brien, L.C.J., and Madden, J.; *diss.* Gibson, J.), that the order fixing a fair rent of the holding did not prevent the landlord recovering possession of the premises on the expiration of the lease.

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

ACTION of ejectment on the title to recover the lands of New Garden in the County of Limerick, containing 61A. 1R. 31P. Irish Plantation Measure. At the date of the passing of the Land Law (Ireland) Act, 1881, Richard Joseph Gabbett, deceased, was in possession of the lands as tenant from year to year, under an agreement dated the 1st January, 1868, at the yearly rent of £193, and continued in possession under this tenancy until the 30th May, 1882, when, by lease of that date, the predecessors in title of the plaintiffs demised the lands to him from the 1st November, 1881, for the term of twenty-one years, at the yearly rent of £168 19*s.* 6*d.* The lease contained a covenant by the lessee not to make a claim for any benefit to which he might be entitled under the Land Law (Ireland) Act, 1881, and to yield up the premises to the lessor at the end of the term. The aggregate valuation of the holdings held by the lessee being over £150, the lessee was under the provisions of section 22 of the Land Law (Ireland) Act, 1881, bound by the contracting out clause. The lessee having, on the 31st October, 1896, served an originating notice of an application to the Land Commission for an order fixing a fair rent of the holding, the Land Commission adjudicated thereon on the 4th May, 1900, fixing a fair rent at £125. The application was opposed by the landlord on the ground the lands were demesne, but the clause whereby the lessee contracted himself out of the benefit of the provisions of the Land Act, 1881, was not relied on by the lessor at the hearing of the fair rent application before the Sub-Commission, nor was it stated as one of the grounds of appeal in the notice of appeal which the landlord brought from the decision of the Sub-Commission to the Land Commission; and at the re-hearing before the Land Commission, liberty to appeal on this ground was refused, and a fair rent was fixed. The title of the lessors under the lease of the 13th May, 1882, became vested in the plaintiffs. Richard Joseph Gabbett died on the 3rd November, 1896, and the defendant, who was his widow, remained in possession of the lands. The lease expired on the 1st November, 1902, and thereupon the plaintiffs, as owners in fee, and as entitled to the reversion expectant on its determination, demanded possession from the defendant, who refused to give up possession. These ejectment proceedings were then instituted.

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The case was tried before Mr. Justice Barton and a special jury at the Limerick Summer Assizes of 1903, whereupon the defendant, who pleaded possession, relied upon the order of the Land Commission fixing a fair rent during the currency of the lease, and upon the definition of "present tenancy" in section 57 of the Land Act, 1881, which included a tenancy created before the 1st January, 1883, in a holding in which a tenancy was subsisting at the time of the passing of the Act. It was agreed on both sides that there was no question of fact for the jury, and inasmuch as both plaintiffs' and defendant's counsel intimated that whatever direction the learned Judge might give, the case would be taken to the Divisional Court by the unsuccessful party, the learned Judge without forming or expressing any definite opinion on the questions raised directed a verdict for the defendant, as being the party in possession, with a stay of execution to enable the plaintiffs to move to have the verdict changed, if so advised.

The plaintiffs now moved that the verdict and judgment entered for the defendant be set aside, and that judgment for possession of the lands be entered for them, or in the alternative for a new trial.

Conner, K.C. (with him *Wakely, K.C.*, and *W. G. Jefferson*), for the plaintiffs:—

The plaintiffs, as owners in fee, are entitled to possession on the expiration of the lease. There is nothing in any of the Land Acts giving any greater degree of permanence than the term granted by it to such a lease as the present: *Peyton* v. *Gilmartin* (1); *Allen* v. *Derby* (2); and particularly the judgment of Holmes, J., in *Peyton* v. *Gilmartin* (1). Sections 4 and 8 of the Land Act, 1881, clearly recognise that the fair rent is only to last so long as the tenancy, whatever it may be, shall continue to subsist. What tenancy can be said to be subsisting here? The defendant is not assisted by section 20 of the Land Act of 1881 relating to the determination of present tenancies, because that section clearly affords no defence where the plaintiff in the ejectment is entitled to possession: *Haren* v. *Archdale* (3). In any event,

(1) 28 L. R. Ir. 378.
(2) 16 L. R. Ir. 346, 351.
(3) 12 L. R. Ir. 306; 14 L. R. Ir. 296.

the defendant in this case, having full power to do so, contracted himself out of any right to occupy the lands after the termination of the subsisting lease. It cannot be contended that the alteration of the rent in any way affected the expiration of the term, and there is no objection to a tenant contracting himself out of some of the provisions of the Land Acts, and not of others: *Ronaldson* v. *La Touche* (1), and *Ferguson* v. *Bradstreet* (2). No estoppel by reason of the fair rent order has been pleaded; such an estoppel could not be pleaded. [He also referred to *Conroy* v. *The Marquis of Drogheda* (3), *Torrens* v. *Cooke* (4), and *The Irish Land Commission* v. *Magorian* (5).]

Redmond Barry, K.C., and *A. M. Sullivan* (with them *R. F. Holmes*), for the defendant:—

The words "present tenancy" in section 8 (3) of the Land Act, 1881, must mean judicial tenancy, which is protected by the absolute prohibition against disturbance in the opening words of section 5. "If it so long continue" means unless determined under sections 5 or 20. All present tenancies are levelled to the same interest by the definition of present tenancy in section 57. At the time of the passing of the Land Act, 1881, there were current thousands of notices to quit, expiring in September or November, 1881. It was to protect tenants under notice to quit from the acceptance of unfair new lettings, that by section 57 all new agreements between landlord and tenant from the passing of the Act to 1883 were practically prohibited. There is no express prohibition against serving notice to quit on judicial tenants, and if the statutory term is dependent on the continuance of the old present tenancy, it might still be determined by notice to quit. With regard to leasehold tenancies created between 1881 and 1883, the whole policy of the 57th section would be defeated by leases for two years made in that interval, for the tenant could be immediately ejected unless the fixing of the fair rent changed the character of the tenancy. Section 13 shows that by fixing a fair

(1) 24 L. R. Ir. 344.
(2) 22 L. R. Ir. 303.
(3) [1894] 2 I. R. 590.
(4) 22 L. R. Ir. 239.
(5) [1901] 2 I. R. 445.

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rent proceedings by notice to quit are impliedly inapplicable to the new tenancy.

[They also referred to *Magner* v. *Hawkes* (1); *Sturges* v. *Ryan* (2); *Kearns* v. *Oliver* (3); *M'Evoy* v. *M'Evoy* (4); *Reg.* v. *The Justices of Cork* (5); *Boyd* v. *Phelan* (6); *Hodges* v. *Clarke* (7); *Townshend* v. *Cotter* (8).]

Wakely, K.C., in reply.

Cur. adv. vult.

Nov. 20.

MADDEN, J. :—

At the time of the passing of the Land Law Act of 1881, the defendant's predecessor in title was in possession of the lands with which the present action of ejectment is conversant as tenant from year to year, and as such was possessed of all the rights of a present tenant under that statute. On the 30th of May, 1882, he accepted a lease of the same lands for the term of twenty-one years from the 1st of November, 1881, which operated to effect a surrender by operation of law of the then existing yearly tenancy. If the case were governed by the common law, and not by the provisions of the Act of 1881, the plaintiff would have been clearly entitled to recover possession on the expiration of the substituted lease on the 1st of November, 1902, and the question for our decision is, whether the defendant's predecessor by virtue of his position as a present tenant, and of the fair rent order, to which I shall presently refer, acquired a more extended term in his holding.

The answer to this question depends on the effect which is to be given to the lease of 1882, not at common law, but under the provisions of the Act of 1881. The present case differs from that which was before the Court of Appeal in *Conroy, tenant; Marquis of Drogheda, landlord* (9), where the effect of a surrender by operation of law, converting a present into a future tenancy, was considered. For in the present case the substituted tenancy,

(1) 28 L. R. Ir. 365.
(2) 24 L. R. Ir. 305.
(3) *Ibid.* 473.
(4) [1897] 1 I. R. 295.
(5) [1900] 2 I. R. 105.
(6) 12 L. R. Ir. 355; 14 L. R. Ir. [232.
(7) 17 I. L. T. R. 83.
(8) 29 L. R. Ir. 243; 31 L. R. Ir. [86.
(9) [1894] 2 I. R. 590.

though created after the passing of the Act, came nevertheless within the definition of a "present tenancy," inasmuch as it was "created before the 1st day of January, 1883, in a holding in which a tenancy was subsisting at the time of the passing of this Act." So far, it is clear that the lease of 1882 did not, in itself, deprive the lessee of his antecedent status of a present tenant.

The effect, however, of this lease must be considered in the light of certain other provisions contained in the Act. It is admitted that the aggregate of the holdings of the tenant at the date of the lease and of the passing of the Act of 1881 exceeded £150. He came therefore under the exception to the general enactment contained in the 22nd section, avoiding "any provision contained in any lease or contract of tenancy or other contract made after the passing of this Act, which provision is inconsistent with any of the foregoing provisions of this Act." The tenant coming within the terms of the exception was "entitled by writing under his hand to contract himself out of any of the provisions of this Act."

This section was considered by the Court of Appeal in *Ronaldson* v. *La Touche* (1), when certain propositions were established, of importance in the present case. It is not "necessary for the purpose of excluding any of the provisions of the Act that the parties should say in so many words that such was their intention." The question is "whether the tenant deliberately entered into a contract with the landlord inconsistent with the position which he would otherwise have under the Act of 1881" (*per* Naish, L.J.). A contract to pay an annual rent of a fixed amount during a defined term of years is inconsistent with a claim to pay only such rent as may be fixed by the Land Commission. Similarly, a covenant to give up possession on the expiration of the term of the demise is inconsistent with the provisions of the Act applicable to a tenant from year to year. FitzGibbon, L.J., points out, as regards the tenant, that the section does not mean that he must contract himself out of the whole Act, or not at all. This is demonstrated by the last clause, which provides

(1) 24 L. R. Ir. 344.

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that, "*save as in the section mentioned, any provision* in an instrument inconsistent *with any of the previous provisions* of the Act shall be void. The section therefore contemplates cases where statutory rights are to prevail over contracts only to a limited extent."

Applying the principles thus laid down to the present case, it appears—(1) that the question of inconsistency arises as between some individual stipulation in the lease or other instrument, and some specific provision in the Act; (2) that to the extent of any such inconsistency, and to such limited extent only, the statutory rights prevail over the contractual rights created by the lease; (3) that on the question of inconsistency between the statute and the lease, different considerations apply to the contractual rent, and to the contractual term of the tenancy.

A contract to pay a definite rent, being inconsistent with the power of applying to fix a judicial rent, necessarily excludes the contracting party from all the other benefits of the Land Act, inasmuch as these benefits are consequent upon, and flow from, the fixing of a judicial rent. And if it could be shown that the rights commonly referred to as fixity of tenure and free sale necessarily flowed from the fixing of such a rent, it would follow that a lessor who had released his tenant from his contract as regards rent had thereby incapacitated himself from relying upon any other stipulation in a lease which conflicted with the provisions of the Act of 1881.

Turning to the facts of the present case, I find that the landlord in opposing the tenant's application for a judicial rent did not rely on the lease of 1882 as a contract in writing, excluding the operation of the Act, and legalized by the provisions of the 22nd section. His counsel endeavoured to raise this question on appeal, but Mr. Justice Meredith declined to entertain it, inasmuch as the point was not made by the notice of appeal. I have no doubt the learned Judge in so acting was applying the statutory procedure by which he was bound. But this procedure would seem to require reconsideration, for it has led to the deplorable result that a judgment has been pronounced in direct opposition to the admitted rights of the litigants on the facts and documents in evidence before the Court. The Land Commission having jurisdiction in the matter, the decision of Mr. Justice Meredith

must be taken as conclusive, so far as regards the fixing of a fair rent. The written contract embodied in the lease of 1882 must be taken as modified, to the extent of admitting the tenant under the lease to the privilege of having a fair rent fixed in respect of that lease, with whatever consequences the statute attaches to such a procedure. But I decline, with the learned Judge, to carry the consequences of the landlord's omission to rely on the contract in the lease any further than is necessary for the purpose of having a judicial rent fixed. In all other respects the lease, in my opinion, remained in full effect. That this was the view of Mr. Justice Meredith appears from his judgment, in which he points out that the judicial rent fixed by him will be payable only during the residue of the term created by the lease. I do not refer to this passage of his judgment as a decision upon a question which was not in issue before him. But it is an authoritative statement of the extent to which he regarded the procedure in his Court as binding the landlord.

I am therefore of opinion that when the tenant obtained the fair rent order his legal status was that of tenant under a subsisting lease for twenty-one years from the 1st November, 1881, and I proceed to consider the effect of the Act of 1881 upon such a tenancy. The general provisions of the Act are not framed with express or exclusive reference to tenancies from year to year. But by reason of the exception of existing leases under the 21st section, existing yearly tenancies were the interests principally dealt with by the Act, and its provisions were mainly directed to tenancies of this kind; and so when it was desired to give tenants, on the expiration of existing leases, the full benefit of the Act, they were not only declared to be present tenants, but tenants from year to year; and the same legislation is to be found in the Act of 1887, and in the Redemption of Rent Act, 1891.

What, then, is the position of a present tenant, other than a tenant from year to year, who obtains an order fixing a judicial rent under the Act? A statutory term of fifteen years is created "in his tenancy," during which he cannot be compelled to pay a higher rent than that fixed by the Court (sect. 5). The 8th sect. provides (sub-sect. 3) that during the statutory term such present tenancy shall (if it so long continues to subsist) be deemed to be a

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tenancy subject to statutory conditions. It is to be observed that the statutory term is created not in the tenant's "holding," but in his "tenancy," a distinction which is marked in the provision in the 5th section empowering the Court, "during the continuance of a statutory term in a tenancy," under certain circumstances, to authorise the resumption by the landlord of the "holding." This distinction is emphasised in the definitions of "holding," "tenant," and "tenancy," contained in the interpretation section of the Act. The words "if it shall so long continue to subsist" in sect. 8, sub-sect. 3, in their plain grammatical sense apply to "such present tenancy," and not to the statutory term engrafted on it, and I see no reason why they should be wrested from their ordinary meaning. No doubt the position of a lessee, in respect of whose tenancy a statutory term has been created, differs in important respects from that of a tenant from year to year. The tenancy of the latter is legally determinable by notice to quit, and a proceeding of this kind is the machinery provided for the enforcement of the statutory conditions. But in a case where landlord and tenant are free to contract themselves out of all or any of the provisions of the Act, I see no reason why a contract should be invalidated because the result is to create statutory conditions without the particular statutory procedure for enforcing them which is provided in the case of yearly tenancies.

The proposition that the effect of fixing a judicial rent is to create a statutory term of fifteen years, irrespective of the duration of the tenancy on which it is engrafted, is inconsistent with the decision of the Court of Appeal in *Peyton* v. *Gilmartin* (1). If I be right in concluding that a lessee who is a present tenant can have a fair rent fixed (as to which see *Magner* v. *Hawkes* (2)), and that the tenant in this case had the status of a lessee when his rent was fixed, the decision in that case, and the following passage from the judgment of Holmes, L.J., are precisely in point, although the determination of the tenancy in that case was not by expiration of the term of the tenancy, but by cesser of the estate out of which it was carved. "The statutory term is thus made dependent on the continuance of the tenancy already in existence, and

(1) 28 L. R. Ir. 378. (2) *Ibid.* 365.

unless the statute contains something extending such tenancy, or giving it a permanence that it could not otherwise possess, it (and the statutory term along with it) would come to an end at the same period and in the same manner as it would have done if the Act of 1881 had not been passed." Not being able to find any such provisions, I am of opinion that the statutory term expired with the lease of 1882 on the 1st November, and that the plaintiff is entitled to judgment. The 20th section has been referred to. But it is obvious from the explanation of that section given by Sir E. Sullivan, C., in *Haren* v. *Archdale* (1) (in which he describes its language as most clear), and from the decision of the Court of Appeal in *Ronaldson* v. *La Touche* (2), that it could never afford a defence to an action of ejectment on the expiration of a demise.

I express no opinion as to what would would have been the effect of the taking of the lease of 1882 upon the tenant's status as present tenant from year to year at the passing of the Act, if the parties had not been in a position to contract themselves out of the Act. On this point, if it ever comes to be argued, the decision of the Court of Appeal in *Ronaldson* v. *La Touche* (2) will have an important bearing. My decision rests on the continued vitality of the lease as an integral part of a lawful contract, left untouched in this particular by the proceedings before Mr. Justice Meredith.

GIBSON, J. :—

This case raises two questions: (1) In the case of a fair rent order creating a judicial tenancy on a holding held under an ordinary present tenancy lease, does the statutory term replace the limit of time fixed by the lease, and has the lessee judicial tenant the same right to fixity of tenure as is enjoyed by other judicial tenants? (2) If this question be answered affirmatively, does the contracting out provision of the lease enable the landlord to insist that the duration of the lease is unaffected, notwithstanding that the rent has been effectually altered by a valid judicial order?

The first of these questions is of much importance in principle. The statute divides existing present tenancies into

(1) 12 L. R. Ir. 306; 14 L. R. Ir. 296. (2) 24 L. R. Ir. 344.

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two classes—(*a*) tenancies under lease (except yearly tenancies and less tenancies) which were taken out of the operation of the Act during the continuance of the leasehold interest; (*b*) other tenancies, which by reason of the definition in sect. 57 must be yearly tenancies. Besides existing present tenancies, there are two classes of prospective lettings which, though future in creation, are clothed with the character of present tenancies. The first class of these constructive present tenancies is represented by tenancies from year to year, automatically and without contract springing up at the expiration of a judicial lease (under sect. 10), and at the expiration of an existing lease, when the lessee is then in occupation (under sect. 21). The other class of constructive present tenancies comprises lettings made within a limited period of holdings held under present tenancies and purchased by the landlord (sect. 20, sub-sect. 3); lettings within a limited period of holdings resumed by the landlord (sect. 21); and tenancies created before January 1st, 1883, in holdings in which there was an existing tenancy when the Act passed.

Tenancies of this last type are contractual, not automatic: they may, subject to sect. 22, be for lives, years, or from year to year, but they are indelibly impressed with the character of present tenancies. The object of the statute was to bestow on every capable present tenant three rights—the right to free sale, which, where not excluded by valid contract, exists independently of any fair rent order; the right to fair rent and the right to fixity of tenure, both of which latter rights originate in a fair rent order or agreement. They do not apply to existing unexpired leases, but when such existing leases expire, they attach to the present yearly tenancies created in the then occupying lessees. Did Parliament intend that prospective present tenants under sects. 20, 21, and 57—whom it sought sedulously to protect—should be in a worse position as regards fixity of tenure than existing lessees? When sect. 10, at the expiration of a judicial lease for a term not exceeding sixty years, made to a present tenant, makes the lessee tenant of an ordinary present tenancy from year to year, was it contemplated that a landlord, who, under sects. 20, 21, and 57,

if he lets, can only let on a present tenancy, was at liberty, if he liked, to make a lease for a short term, with the cesser of which the present tenancy must come to an end? If so, a curious result would ensue. If the lessor in this case had executed to the lessee, who was then a present yearly tenant, a judicial lease for a term not exceeding sixty years, the lessee would have at the expiration of such judicial lease automatically become a present yearly tenant. No judicial lease at all, long or short, having been made, when the present lease runs out, the present tenancy, with its statutory term, on plaintiff's view, becomes extinct for ever. If a lessee who is not present tenant within sect. 57 of the Act of 1881 can get under sect. 3 of the Act of 1887 all the rights of an existing leaseholder under sect. 1 of that Act, must a present tenancy lessee, who comes within the very words of sect. 57, lose all interest in his holding when his lease drops? Can landlords, by making short lettings for upwards of a year, contrary to the spirit of sect. 22, frustrate not merely fixity of tenure, but the provisions as to fair rent? A tenant for a short term could not under the Act of 1881 expect to get the benefit of a fair rent which would only begin from the gale day after the order. In any case such tenant would not apply, as, apart from the disproportionate expense, he would know that by seeking to revise the rent he would make the landlord hostile and unwilling to re-let.

What intention Parliament would have expressed if its attention had been called to the point may not be doubtful, but what we have to determine is whether it has used language adequate to carry out the supposed intention. Possibly *quod voluit non dixit*, and it may have inadvertently failed to extend durability of tenure to a present tenant lessee for years.

The material provisions for consideration are sects. 5, 8, 13, and 20. Primarily no doubt addressed to tenancies from year to year, which alone, when the Act passed, could be made at once the subject of statutory terms, the fair rent procedure must (it is conceded) apply to future lessees constructively made present tenants. A present tenant (according to sect. 57) means a present tenant occupying under a letting for a term of years or for lives, or for lives and years, or from year to year. If all such present tenants can equally apply for and obtain judicial rents with statu-

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tory terms, why should one such tenant be denied fixity of tenure any more than the other? Were not all intended to enjoy identical rights? Can a term created in a lease after the Act deprive the present tenant of his full present tenancy rights?

A yearly tenancy, like a lease for years, may be made by the terms of the letting to last for a particular time only (see notes to *Doe* v. *Bell* (1) and Notice to Quit Act, 1876, sect. 1). Would a judicial tenancy in such case expire when the circumscribing period elapsed?

Assuming that a lease for years can be made, at the instance of landlord or tenant, the subject of a judicial tenancy, the landlord gets from the Court order rights such as resumption and otherwise (*Townshend* v. *Cotter* (2)), which his lease did not give him; and the tenant on whom new conditions in derogation of his lease are imposed is protected during the continuance of the statutory term in his tenancy—that is his tenancy after and as affected by the order—from any increase of rent and from ejectment save for breach of statutory conditions. The lease is not superseded by the order, but so far as it may be inconsistent with the nature of the judicial tenancy, it must give way. The question before us is whether a fair rent order is not incompatible with and does not displace the limit of time fixed by the lease so as to secure fixity of tenure for the lessee.

What is the exact status of the lessee after the order? Defendant's counsel suggest that, the term being wiped out, he is a yearly tenant, and that this is shown by the fact that the only statutory means of enforcing the statutory conditions is notice to quit, which is only applicable to a yearly tenancy. Plaintiffs' counsel urge that the term remains unaffected, and that breach of conditions can only be punished by action for injunction, &c. It was also thrown out that as a tenant holding under a fixed tenancy in pursuance of sect. 12, could only be ejected for breach of statutory conditions, this showed that some new kind of notice to quit might be possible consistently with the leasehold term continuing. But a well-drawn instrument creating a fixed tenancy contains, as the model form issued by the Land Commission shows (see

(1) 2 Smith L. C. 119. (2) 29 L. R. Ir. 243; 31 L. R. Ir. 86.

Edge on Leases), special provisions prescribing the duration and terms of the contract notice to determine such tenancy. A notice to quit is a technical expression; its duration is prescribed by statute; and if in section 13 it means, in reference to ordinary yearly tenancies, the statutory notice, how can it also mean, in reference to a continuing lease for lives or years, some other undefined species of notice? If no notice to quit is competent, a lessor for a term is during the continuance of the lease deprived of the only statutory remedy for breach of statutory conditions, and is worse off than a landlord who lets from year to year.

A fair rent is calculated on a fifteen years' prospective basis. If a lessee for a short term can get a fair rent, is the Court, which knows that under the lease before its eyes the tenancy must soon expire as a present tenancy, to fix the rent on the basis of the unexpired residue of the lease, or on the basis of a fifteen years' term? A statutory term of less than fifteen years does not seem to be contemplated. If the judicial term must necessarily come to an end when the lease expires, Mr. Wakely admits that receipt of rent afterwards would *per se* only set up a future tenancy, notwithstanding that the judicial term might have only just commenced immediately before the lease ended.

The main argument of plaintiff's counsel is based on the position that the continuance of the original tenancy is presupposed as a condition to the duration of the statutory term, and that the words in section 8, sub-sect. 3, "if it" (such present tenancy) "so long continue to subsist," show that with the natural expiration of a lease the statutory term in respect of it disappears. The creation of a statutory term which the duration of the contract of tenancy makes impossible is a mockery. In my view the plan of the fair rent sections is that as against a competent landlord every one possessing the status of present tenant—no matter what may be the duration of his contract tenancy—if not expressly excluded is entitled to obtain a judicial rent, and such rent carries with it against such landlord the full statutory term and other incidents of a judicial tenancy. The continuance of the present tenancy, referred to in sections 5 and 8, relates to the present tenancy as affected by the judicial order, and refers to possible determination

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of the judicial tenancy, but not to expiration of the original present tenancy, which, if the original tenancy was for years, would, on plaintiff's construction, be certain and not contingent. The words "if it shall so long continue to subsist" mean "subsist undetermined." They do not contemplate expiration of the original present tenancy considered apart from the effect of the judicial order, or possibly eviction by title paramount, against which a fair rent order, not being an adjudication *in rem*, would not at all be a protection. A lawful present tenancy is assumed as the foundation of the order, but this tenancy, as invested by the judicial order with continuance for fifteen years, may be determined for breach of conditions. The language is addressed to a supervening contingent determination, and not to a necessary expiration ascertained beforehand. The fact that all existing present tenancies were from year to year would suggest that expiration of a tenancy was not contemplated. Section 3 of the Act of 1896 helps this construction. On the expiration of a statutory term in a present tenancy, the present tenancy is continued as before until the tenancy is *determined* or a new term begins. *Magner* v. *Hawkes* (1) was decided previously, and the Legislature knew of that decision. If a statutory term in a present leasehold tenancy expires during the original term of the lease, the lessee is by section 3 continued as tenant as before until his present tenancy is determined. There is not a word about the present tenancy expiring. Section 10 retrospectively gets rid of previous decisions, such as *Massy* v. *Norse* (2), and protects tenants against certain defects of title in landlords, but in the legislation there is no trace of any idea that the statutory term can cease during the fifteen years by reason of the mere expiration of the original tenancy.

If section 21 of the Act was struck out, could it be supposed that all leaseholders (who on that hypothesis would unquestionably at once come within the fair rent clauses) were left without fixity of tenure?

Sections 13 and 20 also support my construction. Section 13 is not expressly confined to yearly tenants, but take the following

(1) 28 L. R. Ir. 365. (2) 20 L. R. Ir. 57, 464.

case. A landlord before the Act served notice to quit on a yearly tenant, determining the tenancy on November 1st, 1881. At common law the notice would have arrested the continuance of the tenancy and made it a kind of term. Under section 13 it would not operate unless proceedings were taken. The bringing of an ejectment which asserts a right to possession, if there was no stay, would determine the tenancy. If before possession was resumed under section 20, a fair rent was fixed, would not the order revive and continue the old tenancy?

Section 20 is of difficult construction. It may not give a defence against an ejectment, but for the purposes of the Act it prolongs the tenancy, somewhat as in ejectment for non-payment of rent, though the ejectment is based on immediate right to possession, the tenancy continues till execution. The object of the prolongation under section 20 was to secure for the tenant rights he otherwise might lose. If the section applies to future present tenancy leaseholds for years as well as yearly tenancies (and this was not questioned), the leasehold term cannot for the purposes of the Act be deemed inflexible. Would not a yearly tenancy, the duration of which was circumscribed by the original contract of letting, come within the section? Yet such tenancy would in its contract duration be measured by the term.

It must be recollected that all the present tenancies created under sections 20, 21, and 57, must be made after the passing of the Act; and that where there is no contracting out power, any provision in the letting inconsistent with the previous provisions of the Act is made void.

Altogether, consideration of the Act as a whole leads me to the conclusion that a fair rent order made during the currency and in respect of a present tenancy lease made after the Act under sections 20, 21, or 57, just as it modifies the lease in the vital matters of rent, resumption by the landlord and otherwise, equally modifies the original contract in the matter of duration. The judicial tenancy for the statutory term, so far as it is inconsistent with the lease, displaces it. If the landlord can, notwithstanding the leasehold term, resume possession, and increase the contract rent, the tenant on his side can rely on the statutory term as excluding the leasehold term. In principle the alteration of the

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term is a change no larger than that which admittedly takes place in the case of a yearly tenancy, which, though at common law no greater than a tenancy for a year certain, is transformed into what is in substance a series of conditional renewable statutory terms to which notice to quit is no longer applicable if the statutory conditions are observed. What the statute contemplates is a fair rent for fifteen years with a durable tenure. It assumes that every present tenancy, where there is a competent landlord, is capable of being made the subject of the full statutory term. If the statutory term must end with the expiration of the lease, then it is illusory to purport to create it when, at the moment of its creation, it is intrinsically and necessarily to the knowledge of the commission making the order incapable of taking effect. If a present tenancy created after the Act may take the form of a short term lease, then, on the plaintiff's construction, as already indicated, the rights attached to the present tenancy can be evaded, contrary to the spirit, if not the express language, of section 22. Reading the definitions of section 57 into sections 5 and 8, every present tenant, whether for a term of years or from year to year, seems entitled to get a fair rent, and, through it, durability of tenure against a competent landlord and those claiming through him. No doubt when the tenancy is determined the statutory term goes with it, but the tenancy so spoken of is the tenancy after, and as operated on by, the judicial order.

My conclusion, which is contrary to my first impression, is not inconsistent with any of the authorities cited, though there may be probably *dicta* in reference to the law as it then stood, which divorced from the context, may look adverse.

The passage cited from the judgment of Holmes, J., in *Peyton* v. *Gilmartin* (1), was directed to a judicial tenancy as affected by the infirmity of the lessor's title, which had not then been cured by the statute of 1896, and not at all to rule a problem such as that before us.

The cases referred to, which were all decided before the Act of 1896, decide that the contract of letting remains in force, so far as it is not inconsistent with the terms and consequences of the fair rent order, and that the judicial tenancy does not bind owners

(1) 28 L. R. Ir. 378.

whom the landlord was not competent to bind. They do not determine that a judicial tenancy created against a competent landlord leaves the original leasehold intact, or that such tenancy drops when the term expires, or that the face value of the statutory term can be affected by the duration of the original term ascertained and known to the Court when the judicial tenancy was created. The point whether the judicial order and its incidents are not inconsistent with the contract limit of time has never been decided. In *Arran* v. *Wills* (1), where a motion by a lessee for a year certain to stay proceedings pending a fair rent application was refused on the ground that the originating notice was late, counsel did not argue, nor did the Court lay down, that even if the notice was served in time a judicial tenancy was impossible as incapable of being created till after the year had expired. As there is no authority the other way, I feel at liberty to act on my own opinion, that, apart from the contracting out clause, the defendant can rely on the statutory term. My view, on the first point, is that of my brother Madden, whose judgment rests entirely on the contracting out.

Assuming that the fair rent order, by creating a statutory term, is inconsistent with, and removes the limit of time in the lease, the next question is, can the landlord, for the purpose of preserving the limit of time, rely on the provision by which the lessee contracted himself out of the Act? The covenant in the lease was admittedly binding, and was an answer to the fair rent application if it had been brought before the Court. The Court refused to allow it to be relied on, as it was not specified in the notice of appeal, and we must deal with the case as one where the judicial rent was fixed in proper exercise of jurisdiction (*Ex parte Johnston* (2)). The judicial tenancy carries with it the statutory term and statutory conditions. Mr. Justice Meredith having, under section 22 of the Act of 1896, declined to allow the covenant to be used as a defence to the fair rent application, it necessarily follows, as counsel admit, that the covenant cannot affect the adjudication so far as regards the fair rent. I cannot see how the effect of the waiver or estoppel can be subdivided, or how the land-

(1) 14 L. R. Ir. 200, 353. (2) 14 L. R. Ir. 80.

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lord, if precluded from questioning the order *quâ* fair rent, can rely on the special contract as excluding the duration of the consequent statutory term. Whether landlord and tenant by express contract—where power or contract exists—could or could not alter the duration of the statutory term, while leaving the judicial tenancy and conditions intact, no such point arises here. The fair rent was fixed by the Court without regard to the covenant, or any part of the covenant. The landlord was not allowed to use the covenant at all; there was no question of limited and conditional waiver; the landlord never intended to waive; the benefit of the whole covenant was lost by the omission to rely on it; and if the judicial tenancy is fixed on the basis that the lease contains no provision excluding it, it is impossible to vary and reduce the duration of the statutory term consequential on the order by reference to the covenant to which the Court in making its order refused to give any effect. If the judicial tenancy blots out the leasehold term, the ancillary covenants as to giving up possession at the end of the lease fall with the deleted term.

The result, if my opinion were to prevail, is regrettable, as by reason of mere inadvertence the landlord fails in a case where he had a conclusive answer to the tenant's application. A technical omission imposes on him a judicial tenancy in flat violation of the contract in the lease. The hardship of the case, however, cannot be allowed to deflect the law, and I reluctantly decide against the plaintiff.

LORD O'BRIEN, L.C.J.:—

I agree, for practically different reasons, in the result arrived at by my brother Madden, and, though I cannot adopt the conclusions reached by my brother Gibson, I think that many of the considerations adverted to by him are of an important character. However, I cannot think that even these considerations, however important, would justify me in striking out what I consider the plain language of the Act of Parliament. The words that I think plain are "if it so long continue to subsist." These are the words, and that they apply to the present tenancy as distinct from the transformed statutory tenancy, is, in my judgment, absolutely plain.

Mr. Justice Meredith, before whom this case was heard when the fair rent was fixed, said: "A curious result appears to follow, that the rent we fix will only be payable during the currency of the existing lease, for the 3rd sub-section of the 8th section of the Act of 1881 contains the words 'if it so long continue to subsist.'" Now, I pressed counsel for the defendant as to what these words mean, and the answer I got was that they do not refer to the present tenancy, but to the transformed tenancy. That is, in my judgment, wholly unsustainable. The expression clearly relates to the original present tenancy, and it makes the existence of the statutory term dependent upon the existence of the present tenancy, and once the present tenancy fails, the statutory term fails with it. I cannot get out of the plain words of the Act of Parliament. Here are the words of the section:—"Where the judicial rent of any present tenancy has been fixed by the Court, then, until the expiration of a term of fifteen years from the rent-day next succeeding the day on which the determination of the Court has been given (in this Act referred to as a statutory term), such present tenancy shall (*if it so long continue to subsist*) be deemed to be a tenancy subject to statutory conditions."

No matter what was the intention of the framer of the Act of Parliament, I cannot get out of these words. It may be that the framer intended to do as my brother Gibson in his very elaborate judgment suggested, but he has not so expressed himself—in fact he has expressed the contrary. In another case in which I gave judgment this morning, I referred to the concluding passages in the judgment of Lord Watson in *The Pharmaceutical Society* v. *London and Provincial Supply Association* (1), in which he said that even if he were satisfied that it had been the intention of the framer of an Act of Parliament to make a certain provision, he could not give effect to that intention when the framer had failed to use language adequate for the purpose he intended to attain. The case before us is not one where language failed to give effect to an intention existent but unexpressed—here is an intention plainly expressed in appropriate language. It is to be also borne in mind that the 5th section, which deals with the incidents of a tenancy subject to statutory conditions, does not purport to deal

(1) 5 A. C. 857.

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with a statutory term in the "holding," but speaks of a statutory term in the "tenancy."

The case of *The Queen* v. *Justices of Cork* (1), as I said during the argument, has no bearing upon the present case. There it was held that a tenancy from year to year in respect of which a fair rent had been fixed for a statutory term is not such a tenancy as was contemplated by section 121 of the Lands Clauses Act of 1845. We held that, having regard to the test which was stated by Lord Justice Lush to be applicable, namely, "duration," a statutory tenancy founded on a tenancy from year to year *prima facie* would last longer than a tenancy from year to year, as the landlord was deprived of his original power of serving according to his discretion a notice to quit. The "present" tenancy was set free from its original liability to be determined by a notice to quit served by the landlord according, as I have said, to his discretion. I expressed some doubt myself as to whether the quality of the estate, having regard to this fact, was not changed. However, the statutory tenancy was founded in that case upon a tenancy from year to year which had not expired by lapse of time as the original tenancy in the present case, and which tenancy from year to year was shorn of its principal attribute—a liability to be determined by notice to quit served by the landlord at his discretion.

This case is wholly different. Here the "present tenancy" which was the basis of the statutory term has expired by lapse of time, and consequently, in my opinion, the statutory term has ceased to exist. *Peyton* v. *Gilmartin* (2) was referred to. It appears to me that the reasoning and the *ratio decidendi* of both Lord Justice Holmes and my brother Johnson are directly in point, and entirely bear out the view I have taken. My brother Johnson is reported to have said: "So long as the tenancy" (by tenancy he plainly meant "present tenancy") "subsists it is for fifteen years (in the Act referred to as a statutory term), subject to the specified statutory conditions. If within the fifteen years it ceases to subsist, the statutory conditions, and what in the Act is referred to as a statutory term, cease with it." Lord Justice Holmes, after suggesting that the general idea would probably be that the

(1) [1900] 2 I. R. 105.

(2) 28 L. R. Ir. 378.

effect of fixing a fair rent is to convert the previous tenancy into a perpetual lease, subject to certain terms and conditions, and with machinery for revising the rent every fifteen years, says that it would be seen, however, that upon a more critical examination of the provisions of the Act the idea to which he had referred was erroneous. He then goes on in so many words to say "the legislation relative to the statutory term is based upon the continuance of the tenancy already existing, and does not involve the creation of a new tenure. In both the 4th and 8th sections it is declared that the tenancy already in existence shall, if it so long continue to subsist, be deemed to be a tenancy subject to statutory conditions. The statutory term is thus made dependent upon the continuance of the term already in existence." Nothing could be plainer than this, and it precisely expresses my view. The words "if it so long continue to subsist," which I consider conclusive, he makes the dominant and determining factor in his judgment. No doubt the facts in *Peyton* v. *Gilmartin* (1) were different, but the *ratio decidendi* is strictly applicable to this case. In *Peyton* v. *Gilmartin* (1) it appeared that a tenancy from year to year was created by a tenant for life, and that a fair rent was fixed in reference to that tenancy. It was held that on the cesser of the life estate, the tenancy from year to year having ceased to exist, the statutory term which was founded on the tenancy from year to year fell with it. The *ratio decidendi* of my brother Johnson and Lord Justice Holmes in that case is, as I have said, directly in point.

The judgment of the majority of the Court in *Peyton* v. *Gilmartin* (1) was not appealed against, and has been acted upon now for many years as a correct interpretation of the statute.

I have heard my brother Madden's judgment on the effect of the "contracting out" clause, and I say no more than that I do not dissent from it. The fixing of the fair rent may, perhaps, be regarded as having the effect of writing into the lease a different amount of rent from that originally there, but leaving the contracting out clause operative in other respects. However, I prefer to rest my judgment on the effect of the words "if it so long continue to subsist."

J. L.

(1) 28 L. R. Ir. 378.

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Feb. 1, 2, 8.

The defendant appealed to the Court of Appeal (FITZGIBBON, WALKER, and HOLMES, L.JJ.)

Redmond Barry, K.C., and *A. M. Sullivan* (with them *R. F. Holmes*), for the appellant.

Conner, K.C., and *Wakely, K.C.* (with them *Jefferson*), for the respondent.

The arguments were the same as in the Court below.

Cur. adv. vult.

Feb. 8.

FITZGIBBON, L.J. :—

This is an ejectment on the title by assignee of lessor against assignee of lessee, claiming possession of certain lands on the expiration of a lease dated May 30, 1882, for a term of twenty-one years which expired on November 1, 1902.

The defence is in the general form, and its foundation is the contention that the fixing of a fair rent upon the holding, since the lease, has given the defendant a tenancy from year to year under the Land Act, 1881, which cannot be determined. At the passing of that Act a tenancy from year to year was subsisting in the holding, and, therefore, the tenancy which was created by the lease before January 1, 1883, was a "present tenancy" within the definition in sect. 57.

There appear to have been strong grounds for the contention that the Act did not apply to the tenancy, because the holding was demesne land, or was let to be used wholly or mainly for the purpose of pasture; but the tenant on October 31, 1896, served an originating notice, grounded on the Act of 1887, to fix a fair rent under the Act of 1881, sect. 8 (1). A Sub-Commission fixed a fair rent on this notice, though the Act of 1887 did not apply to the case, because the lease was not existing at the passing of the Act of 1881.

The landlord served notice of re-hearing, which in 1899 came before the Land Commission, where it had a troubled time described in detail by Meredith, J., in a judgment delivered on May 4, 1900, when an order was made fixing a fair rent upon the holding, not under the Act of 1887, but under

the Act of 1881. The merits of the case, so far as they related to the question now at issue, and to other matters too, were shut out upon technical grounds; the landlord was not permitted to prove, or to rely upon the fact, of which the Land Commission had judicial knowledge in other proceedings then pending between the same or practically the same parties, the same counsel appearing, that the lessee in 1882 was a tenant the aggregate of whose holdings was valued at not less than £150, and that he, therefore, was entitled under sect. 22 by writing under his hand—and therefore by the lease—to contract himself out of any of the provisions of the Act. There is some justification for the remark of Madden, J., that the procedure of the Land Commission on that occasion "led to the deplorable result that a judgment was pronounced in direct opposition to the admitted rights of the litigants on the facts and documents in evidence before the Court," and for the observations of Gibson, J., that the result of his opinion in favour of the defendant would be regrettable, as by reason of mere inadvertence the landlord would fail in a case where he had a conclusive answer to the tenant's application; and that a technical omission imposed on him a judicial tenancy in flat violation of the contract in the lease.

Nevertheless the King's Bench Division has taken, and I take, the decision of Meredith, J., as now "conclusive, so far as regards the fixing of a fair rent," though I think that the lessee contracted himself out of the right to alter the rent during the lease. But whether the decision be right or wrong, it cannot work an estoppel, nor affect the right of possession, after the expiration of the lease. Its effect, so far as the question before us is concerned, is thus described by Meredith, J.:—

> "The curious result appears to follow, that the rent we fix will only be payable during the currency of the existing lease, for the Act of 1881, sect. 8 (3), contains the words 'if it [the tenancy] so long continue to subsist.' The tenancy in this case is not a tenancy from year to year, nor does it come within the Act of 1881, sect. 21, or the Act of 1887, sect. 1. What the result will be when the term of the lease expires in a couple of years is an interesting question."

The lease has expired; this "interesting question" has divided the King's Bench Division, and now comes here, as the

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"deplorable result" of the procedure to which Madden, J., referred.

The contention of the defendant is in substance that the fixing of the fair rent of a present tenancy under sect. 8, sub-sect. (1), makes it, under sub-sect. (3), a tenancy for "a statutory term" of fifteen years from the day on which the rent is fixed, and that, being "deemed to be a tenancy subject to statutory conditions,' it is protected by the provision of sect. 5 that the tenant shall not be compelled to quit the holding except in consequence of the breach of some one or more of the statutory conditions. But this argument is, to my mind, displaced by the fact that the application of sect. 8 (3) is subject to an express proviso, and that the protection of sect. 5 is correlatively limited to the period fixed by that proviso. The "present tenancy" is to be "deemed to be a tenancy subject to statutory conditions" only "if it so long continue to subsist," and the tenant's protection under sect. 5 lasts only "during the continuance of a statutory term in his tenancy."

Thus the real question is reduced to this—Did the lessee's tenancy continue to subsist after the expiration of the lease?

There was nothing to extend it except the fixing of the fair rent. Meredith, J., when fixing the rent, was of opinion that it would only be payable during the currency of the lease. If he was right in this, lease rent and tenancy must all end together, and I think he was right. It has long been held impossible to interpret the Land Acts otherwise than in accordance with their words. The words here are plain. If we were to speculate, it may be that the gap between January 1, 1883, in the Act of 1881, sect. 57, and the passing of that Act in sect. 21, and in the Act of 1887, sect. 1, was not noticed to be material in the case of leases taken during that period by "present tenants." But it is admitted that this lessee was left out of the Act of 1887, and also out of the Act of 1881, sect. 21. He is in Limbo between "present tenants" and "future tenants," but he is not within any of the provisions in favour of lessees as such, and we cannot by implication extend his "tenancy" beyond his lease.

But even if other "present tenants" could come in, this lessee has contracted himself out. The lease is not merely for a term of

twenty-one years which ended on November 1, 1902: it contains an express covenant by the lessee at the end of that term to yield up the demised premises to the lessor. This lessee is now admitted to have been under the Act of 1881, sect. 22, "entitled, by writing under his hand, to contract himself out of any of the provisions of this Act," and even if the fixing of the fair rent would otherwise have extended the duration of his tenancy, I can see nothing to relieve him from the obligation to give up the possession to the landlord on November 1, 1902, the day upon which, notwithstanding "the provisions of this Act," he contracted to leave the holding.

The Chief Justice gave judgment for the plaintiff upon the first and broad ground, holding the words "if it so long continue to subsist" to be conclusive. He makes them "the dominant and determining factor in his judgment." So do I. On the narrower ground of "contracting out" the Chief Justice did not dissent from the judgment of Madden, J. I go farther: I agree with that judgment; I can find no answer to either judgment, either in the Act or in the speculative difficulties which led Gibson, J., to the "regrettable" result at which he arrived.

The appeal must be dismissed with costs.

WALKER, L.J.:—

The lands the subject of this action are or were held under a lease dated 30th May, 1882, for a term of twenty-one years from the 1st November, 1881, so that the tenancy under the lease came to an end on the 1st November, 1902.

The landlord demanded possession and has followed up his demand by an ejectment on the title. The defendant contends that by virtue of the provisions of the Land Acts as applied to his tenancy he has a good defence.

I shall put out of view for the present the covenant contained in the lease, upon which much of the argument turned both in the King's Bench Division and here, and consider the case on the assumption that no such covenant had been entered into.

The case of the defendant is the following:—He says—(1) this was a present tenancy within the meaning of the Land Act of 1881; (2) this involved a right to fix a fair rent and create a

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statutory tenancy; (3) this statutory tenancy will endure for a period of fifteen years, and on the expiration of such statutory term the present tenancy will continue subject to the same rent and conditions with the consequential rights, created or affirmed by the 3rd section of the Act of 1896, of creating a new statutory term and again applying to fix a fair rent, and therefore he says there was a statutory term in existence when this action was brought. If he is right in this, it follows that he cannot be compelled to quit his holding unless for reasons and under circumstances which have not arisen.

Now (1) it is clear, and it has not been disputed by the respondent's counsel, that the tenancy under the lease of 30th May, 1882, was a present tenancy within the Act of 1881; (2) it was not disputed (apart from a contention founded on the covenant in the lease) that the tenant had a consequential right to fix a fair rent, and it appears that the tenant on the 20th October, 1896, served an originating notice to fix a fair rent, under which a fair rent was ultimately fixed by the Land Commission Court on the 4th May, 1900, and it is not disputed that a statutory term then came into existence.

In my opinion, the real question in the case is whether that statutory term survived the 1st November, 1902, and continued to subsist thereafter. I pointed out during the argument that the tenant on the argument for the landlord was left in a curious position. If he had held on to his yearly tenancy, which was in existence on the 22nd August, 1881, he would have a defence to this ejectment. Further, if his lease had borne date the 21st August, 1881, he would also have a defence by virtue of the provisions of the 21st section and the enactments which extend it, and it seems unfortunate that he should fail because he took his lease between the 22nd August, 1881, and 1st January, 1883. This suggestion of hardship was answered by the statement that the taking of a lease on the 30th May, 1882, was his voluntary act, under which he got some rights and the landlord acquired others. It seems to me that we cannot pay any attention to arguments founded upon suggestions of hardship on either side. The rights depend upon the provisions of the Land Acts—mainly that of 1881—and we must find them there.

It is sufficient for the purpose in hand to say that the Act of 1881 divides tenancies into present tenancies—future tenancies—existing leaseholds—which, subject to certain conditions as to term, become at their expiration automatically transmuted into present tenancies—and tenancies specially excepted from the provisions of the Act. "Judicial leases" and "fixed tenancies" are tenancies not existing, but contemplated.

Again, "present tenancies" include a present "ordinary tenancy," which is a tenancy to which the Act applies, and is not a tenancy subject to statutory conditions, or a judicial lease, or a fixed tenancy.

Now the subject with which we have to deal is a present ordinary tenancy, in respect of which a fair rent has been fixed, and the effect of that fixing on the tenancy is the question. There is one instance in the case of a future tenancy in which such future tenancy may become a tenancy subject to statutory conditions—viz.: where the landlord demands an increase from the tenant of it, and the tenant of the future tenancy accepts the increase; there in the words of the 4th section "until the expiration of a term of fifteen years from the time when such increase was made (in this Act referred to as a statutory term), such tenancy shall (if it so long continue to subsist) be deemed to be a tenancy subject to statutory conditions, with such incidents during the continuance of the said term as are in this Act in that behalf mentioned."

Bearing in mind that the words "if it so long continue to subsist" here apply to a future tenancy in respect of which a statutory term has arisen, it is important to note the consequences in such a case when the future tenant declines to accept the increase. They are two—(1) He may sell the future tenancy subject to the increased rent, and in addition to the price recover from the landlord the ascertained depreciation below the selling value at a fair rent. (2) If he does not accept the increase and does not sell, and is compelled to quit the tenancy by a notice to quit, he may claim compensation for disturbance.

In the case of a present tenancy the same power of demanding an increase is given to the landlord, and if it is accepted the same results follow as when the tenant of a future tenancy accepts

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it, and the rights as to the creation and subsistance of the statutory tenancy are conferred in the same words and by the same subsection, but with this important difference, that the tenant of a present tenancy, instead of accepting or declining the increase, may apply to have a fair rent fixed.

The 5th and 8th sections are those in which the effect of a statutory term in a tenancy is to be found. The result is that when a fair rent is fixed, the present tenancy from the date mentioned is deemed to be a tenancy subject to statutory conditions. It will be found, I think, that those 5th and 8th sections draw a clear distinction between (*a*) the duration of the statutory term itself, including the effect while the statutory term continues, and (*b*) the subsistence of the tenancy on which the statutory term is engrafted. The statutory term *prima facie* continues for a period of fifteen years from the prescribed date of the fixing of the judicial rent, and while that statutory term continues several consequences follow, some for the benefit of the tenant, and others for the benefit of the landlord. The tenant's rent cannot be raised, and he cannot be compelled to quit the holding of which he is tenant, except for the breach of some statutory condition. Those conditions are considerable in number, and are for the benefit of the landlord. They modify and alter the contract rights, and give him, under certain conditions and restrictions, a right of resumption. Remedies are given to the landlord for the breach of the statutory conditions—in the case of non-payment of rent by ejectment for non-payment of rent, and in the case of other statutory conditions by ejectment founded on notice to quit—but those remedies are subject to certain discretionary powers vested in the hands of the Land Commission or Court. The *prima facie* continuance of the statutory tenancy is clear, and the rights of the judicial tenant while it lasts are also clear, but in my opinion the existence of the statutory term itself is dependent on the subsistence of the present tenancy to which it has become attracted. The incidents cannot survive the subject to which they are attached. It is quite true that when there is a yearly tenancy existing at the passing of the Act, or created after it before January 1, 1883, in such a manner as to raise a present tenancy, then the fixing of a fair rent will create a statutory term and

tenancy subject to statutory conditions, which tenancy will practically be indestructible, save by the means mentioned in section 5, or (subject to the provisions of section 10 of the Act of 1896) the cesser of the landlord's estate. The subsistence of the tenancy in this case is due to the restrictions on its destruction which the statute expressly enacts.

But in the case now before the Court, the lease of May 30, 1882, was one which could be lawfully made, and its expiration on November 1, 1902, was a lawful and essential incident to its creation, and though, as it was a present tenancy, a fair rent (apart from any lawful prohibition contained in the lease) could be fixed, and a statutory term created which conferred on the tenant on the one hand, and the landlord on the other, all the rights and advantages which are incident to such a term, still the statutory term and conditions depended on the existence of the present tenancy, and could not survive that tenancy. The words "such present tenancy shall (if it so long continue to subsist) be deemed to be a tenancy subject to statutory conditions," are apt words to meet this case, and the word "subsist" includes failure, determination, or expiration, by any lawful means, and also, while the statutory term lasts, compulsory quitting by reason of breach of condition. It is only by keeping in mind the distinction between the tenancy and statutory conditions that the full force of the words "if it so long continue to subsist" can be appreciated.

I am, therefore, of opinion that this lease ended on November 1, 1902, though it had assumed the statutory incidents while it continued to subsist.

I do not think it necessary to express any definite opinion on the other question arising on the covenant in the lease, but speaking for myself I should have difficulty in holding that if by reason of the waiver by the landlord of his rights under the covenant a fair rent was fixed which involved the creation of a statutory term which had a present existence, the landlord could now set up the covenant to prevent those consequences following which the fixing of a fair rent involved. The question, however, is a difficult one, and I appreciate the argument that at all events the covenant can be relied on to affirm the lawfulness of the con-

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tract which made the tenancy expire on November 1, 1902. I rest my judgment upon the other ground.

HOLMES, L.J.:—

At the date of the passing of the Land Law (Ireland) Act, 1881, the lands sought to be recovered in the action were held by Richard Joseph Gabbett as tenant from year to year; and on the 30th May, 1882, the then landlord gave him a lease of the holding for the term of twenty-one years at a rent lower than that previously paid by him, and subject to certain special covenants, one of which bound him not to make a claim for any benefit to which as tenant he might be entitled under the above-mentioned statute. As the aggregate of Mr. Gabbett's holdings were valued under the Valuation Acts at an annual sum of more than £150, the covenant I have quoted was not avoided by sect. 22; and although he was a present tenant as defined by sect. 57, he was not entitled to apply to the Land Commission to fix the rent of the lands.

The lessee continued to pay the rent reserved by the lease until the year 1896, when for the first time he served an originating notice claiming a fair rent. From what was no doubt an oversight, the landlord did not rely, as he might have done, on the covenant as an answer to the tenant's application; and although Meredith, J., called attention to the point, he refused leave to raise this objection on the ground that it had not been mentioned in the notice of appeal. This was, in my opinion, an unfortunate exercise of judicial discretion. The rule now generally acted on in every Court is that a litigant, as long as the litigation is still pending, ought not to lose his legal right through the error or negligence of his advisers, provided his adversary can be indemnified against the consequences thereof by an equitable adjustment of costs.

What was then done, however, cannot now be undone; and the present action must be dealt with on the basis that during the currency of the lease the tenant had the fair rent of his holding duly fixed under the provisions of the Act of 1881. The question for decision is whether the statutory term thus created came to an end at the expiration of the demise on the 1st November, 1902; and this seems to me to depend on (1) whether

the lease when executed was a valid and effective instrument; and (2), if so, to what extent were its provisions modified by the fair rent order. It was argued, but not strenuously, by Mr. Sullivan that Mr. Gabbett, notwithstanding the execution of the lease, continued to be tenant from year to year. This proposition can only be sustained by showing that the lease was avoided by the Act, and I can find in it no such provision. The acceptance of a fixed term of twenty-one years in exchange for a previous yearly tenure is not inconsistent with anything to be found in the Land Acts. Such inconsistency, even if it existed, would not, having regard to the valuation of Mr. Gabbett's holdings, have deprived him of the right of substituting the new contract for the old one; but apart from the valuation point, I am of opinion that any yearly tenant after the Act of 1881 had the same power which he possessed before of surrendering his existing tenancy, and of taking in substitution for it a term of years. Thereupon the provisions of the contract as between himself and his landlord regarding rent, duration, and other stipulations are to be looked for in the substituted instrument; and if either party relies on any alteration or modification thereof, it rests on him to show how this has been brought about.

I now come to the fixing of the fair rent, which it is admitted changed to some extent the previous contractual relations of landlord and tenant. It undoubtedly altered the rent, and imposed upon both what are known as "statutory conditions." It also had the effect of striking out of the lease every provision inconsistent with the rights and liabilities which the Act has attached to a statutory term. Amongst them is there included the extension of the statutory term beyond the term created by the lease? In considering this, little or no help can be gained from authorities or sections of the Act relating to other subjects. It is almost certain that the question arising in this case was not present to the mind of the Legislature. Contracts of tenancy existing on the 22nd August, 1881, other than yearly tenancies and tenancies less than yearly tenancies, are dealt with by section 21. Where similar contracts were made after the 1st January, 1883, a fair rent cannot be fixed during their currency, but a lease for a term of years executed before the 1st January, 1883, of lands held under

Appeal. 1904. COPE v. GABBETT. Holmes, L.J.

a yearly tenancy at the date of the passing of the Act seems to have been entirely overlooked. The language of section 8, taken in connection with the definition of "present tenancy," enables such a lessee to have a fair rent fixed; but we must look to the words of the Act for the duration of the statutory term. Section 8 declares that it will continue for fifteen years if such present tenancy, that is to say, the tenancy in existence at the date of the fair rent order, so long continues to subsist. But by a valid contract of the parties this tenancy came to an end on the 1st November, 1902, and with it there disappeared the statutory term and statutory conditions. I think that no other construction is possible. The 5th section no doubt provides that the tenant shall not during the continuance of a statutory term in his tenancy be compelled to quit the holding except in consequence of the breach of one of the statutory conditions. These words may, and probably do, prevent the landlord from terminating a yearly tenancy by notice to quit during the statutory term; but what they relate to is something done during its continuance, and have no application after it has ended. In *Peyton* v. *Gilmartin* (1) it was held that where the tenant of a present yearly tenancy created by a landlord who was only tenant for life of the reversion had a fair rent fixed, his statutory term ceased with the determination of the life estate. That judgment was not appealed from, and its authority is recognised by the Land Law (Ireland) Act, 1896, section 10, which amends the previous law. In the present case, by a contract entered into before the fair rent order, the tenancy came to an end. The two cases cannot be distinguished in principle, and I have heard no argument to satisfy me that this principle is unsound.

I therefore concur in dismissing the appeal.

Solicitors for the plaintiff: *Sellors & Company.*
Solicitor for the defendant: *Blackhall.*

G. Y. D.

(1) 28 L. R. Ir. 378.

IN THE GOODS OF JOHN MAHON, DECEASED; MAHON *v.* QUINN (1).

(1904. No. 3.)

K. B. Div.
Probate.
1904.
Feb. 22.

Probate—Action for revocation of grant—Laches—Acquiescence.

A person claiming to be sole next-of-kin of a testator, who died ten years before, having made a will leaving his property, very small in amount, to a stranger, brought an action to revoke the grant of probate made to the executor in common form. The plaintiff was shortly after the death of the testator aware of the existence of the will and of its terms, but took no step to contest the will, and allowed the executor to administer the estate. No grounds were alleged for disputing the will. The Court held that it would be contrary to settled principle to allow the plaintiff to proceed with the action, which was groundless and vexatious, and made an order staying further proceedings.

MOTION.

This was an application on behalf of the defendant, the Rev. Richard Quinn, for an order that the action be stayed or dismissed as *mala fide*, oppressive, and an abuse of the process of the Court. The action was brought on January 11th, 1904, by Edward Mahon, who claimed to be the son and sole next-of-kin of John Mahon, late of the Lodge, Carmelite Convent, Tallaght, in the county of Dublin, who died on October 1st, 1894, to have the grant of probate of the alleged last will of the said John Mahon, dated May 25th, 1893, revoked, and administration of his personal estate and effects granted to the plaintiff.

By his will John Mahon, who resided in the lodge belonging to the Carmelite Community, Tallaght, county Dublin, bequeathed all his property to Mrs. Mahon, the Superioress of the Carmelite Community at Tallaght, and directed that his funeral expenses be paid out of his property, and appointed the said Richard Quinn, Roman Catholic Curate, of Bohernabreenagh, Tallaght, his sole executor.

(1) Before ANDREWS, J.

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The assets of the deceased amounted to £37 only.

The executor proved the will on December 18, 1894, and duly administered the assets in the following manner. He paid the costs of extracting probate, and paid the remainder of the assets in pursuance of the testator's wishes, as expressed in the will, to the universal legatee, who discharged the funeral expenses of the deceased. This administration was completed on December 20th, 1894. The plaintiff was a discharged soldier at the time of his father's death, and was informed of his death at or about the time it happened. He was also aware that his father had made a will, and of the terms of it. Shortly after the death he called at the convent and made a disturbance there, which was stopped by Mr. Quinn, who was called in for the purpose. Since then, until the month of January, 1904, when the writ of summons was issued, no steps were taken. A statement of claim was delivered, alleging want of testamentary capacity and undue influence. These facts appeared from the affidavits of Mr. Quinn; no affidavit was made by the plaintiff, who appeared in person on the hearing of the motion, and made unfounded charges against Mr. Quinn.

Dudley White, in support of the motion :—

Though generally time is no bar to an application to revoke a grant of probate, yet great delay in applying has been held a bar. Here there has not only been the lapse of ten years, but there has been knowledge and acquiescence also on the part of the applicant, who has allowed the estate to be administered.

[*Goods of Topping* (1); *Blake* v. *Knight* (2); *Lopes* v. *Hartley* (3); *Goods of Thomas Robinson* (4); *Mohan* v. *Broughton* (5); Maxwell's Probate Practice, 260, 396, were cited.]

ANDREWS, J. :—

The hearing of this application has been considerably prolonged, owing to the plaintiff having appeared in person. Much

(1) 2 Rob. 620.
(2) 3 Curt. 553.
(3) 7 N. C., Suppl. xxxi.
(4) 3 Phill. 511.
(5) [1900] P. 56.

that he has said has been irrelevant, and I think it right to state that I give no credence to his allegations against Father Quinn, which are unsupported by any evidence. I shall assume that the plaintiff is a lawful son, and one of the next-of-kin of the deceased, and that it would have been competent to him after his father's death to have contested the will made in 1893. It appears, however, both from the affidavit of Father Quinn, and from the plaintiff's own statements made here in Court, that at the time of his father's death, which occurred in the month of October, 1894, he knew that his father had made a will; and his statements to the effect that he was dissatisfied with it made it the more incumbent on him, if he intended to contest its validity, to proceed to do so without delay. Instead of doing so, however, the plaintiff stood by and allowed Father Quinn to proceed as he did to prove the will in common form and fully administer the assets, which were of small amount. No step was taken by the plaintiff until quite recently, when he issued the writ in this action. He has neither accounted for his delay, nor offered any evidence to show that he has any grounds for disputing the will, or that there is any foundation whatever for this action. It would be contrary to settled principle to allow him now (after standing by for years and permitting Father Quinn to fully administer the assets of the deceased, and in doing so to materially alter his position) to proceed with the present action, which I consider a groundless and vexatious one, and I must order that all further proceedings in this action be stayed, and direct the plaintiff to pay the defendant's costs of this action, and the costs of this motion.

Solicitor for the defendant: *J. J. O'Meara.*

W. L.

K. B. Div. 1903. April 27, 28. May 12.

Appeal. Nov. 18–20. Dec. 21.

THE KING (BALLYCASTLE RURAL DISTRICT COUNCIL) *v.* THE LOCAL GOVERNMENT BOARD FOR IRELAND (1).

Local government—Water supply—Contributory place—Liability of contributory place for expense of water supply to part of such place—Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52), *s.* 233—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37)—*Public Health (Ireland) Act*, 1900 (63 & 64 *Vict. c.* 10)—*Powers of Local Government Board.*

The Local Government Board have no absolute discretion to determine the area of charge on which special expenses under the Public Health Act shall be levied. Apart from the provisions of the Public Health (Ireland) Act, 1900, which enables the Local Government Board, with the consent of the Rural District Council, to impose such expense on the whole rural district, their power is to determine which of the four units mentioned in section 232 of the Public Health (Ireland) Act, 1878 (2), is to be selected as the area of charge. They have no power to aggregate two or more of these units, unless each such unit is a place in respect of which the expenses have been incurred.

Decision of the King's Bench Division reversed.

In or about the year 1901 it became necessary to provide a new water supply and system of sewage for the town of Cushendall, in the county of Antrim, and in the rural district of Ballycastle.

(1) In the King's Bench Division, before Lord O'Brien, L.C.J., and Johnson and Kenny, JJ.

(2) Public Health (Ireland) Act, 1878, section 232:—

"The expenses incurred by a rural sanitary authority in the execution of this Act shall be divided into general expenses and special expenses.

"General expenses, other than those chargeable upon owners and occupiers under this Act, shall be the expenses of the establishment and officers of the sanitary authority, and all other expenses not determined by this Act or the order of the Local Government Board to be special expenses.

"Special expenses shall be the expenses of the construction, maintenance, and cleansing of sewers in any contributory place within the district, the providing of a supply of water to any such place, the providing, repairing, and cleansing public wells, the lighting where duly authorised, the charges or expenses arising out of or incidental to the possession of property transferred to the rural sanitary authority in trust for any district or contributory place,

The rural district of Ballycastle contained about 102,197 acres, bounded by a coast line extending from the Giant's Causeway to Red Bay, covering a distance of about thirty miles. Cushendall is about two miles from Red Bay, and the ordinary population of the town is about 380, of the townland 390, and of the Electoral Division 713. The dispensary district in which the town is situated included the Electoral Division of Cushleake, Glendon, Cushendall, and Red Bay, comprising 131 townlands, and an area of 34,326 acres, a large portion of which was entirely rural,

and all other expenses incurred or payable by the sanitary authority in or in respect of any contributory place within the district, and determined by the order of the Local Government Board to be special expenses.

"When the rural sanitary authority makes any sewers or provides any water supply or executes any other work under this Act for the common benefit of any two or more contributory places within its district, it may apportion the expense of constructing any such work and of maintaining the same, in such proportions as it thinks just, between such contributory places; and any expense so apportioned to any such contributory place shall be deemed to be special expenses legally incurred in respect of such contributory place.

"Ten or more ratepayers, or any number of persons liable to be rated to one-fifth part of the whole rate, of any contributory place, if aggrieved by any such apportionment, may send or deliver a memorial to the Local Government Board stating their grounds of complaint, and the said Board may, after due inquiry, make such order in the matter as to it may seem equitable, and the order so made shall be binding and conclusive upon all parties concerned.

"General expenses shall be payable out of a common fund to be raised out of the poor rate of the electoral divisions or parts thereof in the district according to the rateable value of each electoral division or part thereof.

"Special expenses shall be a separate charge on some contributory place or places.

"The following areas situated in a rural sanitary district shall be contributory places for the purposes of this Act; that is to say,

"(1.) The dispensary district:

"(2.) The electoral division:

"(3.) The townland:

"(4.) Such portions of any townland or townlands as may be determined by the Local Government Board:

Provided that the Local Government Board shall have power to determine on what area of charge, being a contributory place, or consisting of contributory places, any special expenses shall be chargeable, whether incurred after the passing of this Act or still due in respect of works executed before the passing of this Act."

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and contained a population of 2864. The estimated cost of the works was £1600. The District Council insisted that the necessary sewage and waterworks would only affect the town of Cushendall, covering about twenty acres, would be of no service to any of the other inhabitants of the Electoral Division, and certainly would not benefit the inhabitants of the rural district of Ballycastle outside the town of Cushendall, consequently no apportionment had been made of the expenses of constructing or maintaining the said works between different contributory places by the said council. The construction of these works had been under consideration for a long time: the necessity for the works was admitted, and the sole question was the area of charge.

By a sealed order of the 15th May, 1899, the Local Government Board had directed that "from and after the 1st April, 1899, the following provisions should take effect with regard to the area of charge for rural sanitary expenses in respect of which any ratepayer or ratepayers remained liable on that date:—

"ARTICLE I.—*Rural District Areas.*—Subject to exceptions set forth in Article II. of this order, the area of charge shall be the rural district, or rural districts, in which the original area is comprised.

"ARTICLE II.—*Exceptions.*—(1.) Where the original area consisted of, or included, a town or towns (other than an urban district or districts) under municipal Governments, the original area shall continue to be the area of charge. (2.) In the case of the unions the names of which are set forth in the schedule to this order, the area of charge shall be the dispensary district, or dispensary districts, as at present constituted, in which the original area is comprised—except any portion of such dispensary district, or districts, included in an urban district."

On the 20th October, 1899, the Local Government Board wrote to the Ballycastle District Council stating that the area of charge for future rural sanitary expenses in the Ballycastle Rural District would be the entire rural district. The District Council by resolution dated the 21st October, 1899, pointed out that the sealed order of 15th May, 1899, would inflict great injustice on the majority of the ratepayers of the district, and requested them to withdraw it. This the Local Government Board refused to

do, and the order was subsequently confirmed by Act of Parliament, 62 & 63 Vict. c. 31, s. 5.

A long correspondence ensued between the Local Government Board and the District Council as to the area of charge for the expenses of the proposed works in Cushendall, and the District Council passed a resolution that the costs of these should be charged only on the benefited area. Notwithstanding this resolution, by sealed order dated the 11th September, 1902, and directed to the Ballycastle Rural District Council, the Local Government Board ordered and declared that the area of charge on which all expenses incurred, or which might be incurred, for the purpose of improving and maintaining the water supply and sewage of Cushendall in the said rural district should be chargeable, should be the portion of the Ballycastle Rural District which is not comprised in the townlands of Rathlin Island and Townparks (1). The Rural District Council insisted that pursuant to the Public Health Act, under which this order purported to be made, only localities benefited by the works should be called on to bear portion of the expenses as contributory places within the meaning of the said Act.

By a resolution of the 21st October, 1902, the District Council objected to the area of charge proposed as being a violation of section 232 of the Public Health Act of 1875, and of section 27 of the Local Government Act, 1898; but the Local Government Board refused to alter the order, alleging that they were endeavouring to adopt, as far as possible, a similar line of policy in regard to all new works proposed by rural sanitary authorities as that adopted in the sealed order of 15th May, 1899, in regard to expenses incurred prior to 1st April, 1899. The District Council having obtained from the King's Bench a conditional order for a writ of *certiorari* to quash the sealed order of the 11th September, 1902, as having been made without jurisdiction and in excess of jurisdiction, and cause having been shown by the Local Government Board, the present application was to make the conditional order absolute notwithstanding cause shown. In the affidavit of

(1) Townparks in this order comprised the town of Ballycastle, which at the time was individually contributing to its own water supply.

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Mr. Swaine, the Secretary of the Local Government Board, filed by way of cause, it was stated that the order in question had been issued by the Local Government Board after a careful consideration of all the facts of the case.

Harrison, K.C., *Healy, K.C.*, and *Megaw*, for the Ballycastle Rural District Council.

The Solicitor-General (*Campbell, K.C.*), *Chambers, K.C.*, and *Chaytor*, for the Local Government Board.

Cur. adv. vult.

May 12.

LORD O'BRIEN, L.C.J.:—

This was an application by the Ballycastle Rural District Council to make absolute a conditional order to quash a certain sealed order of the Local Government Board of the 11th day of September, 1902. I shall read the order that is impugned; it is as follows:—[His Lordship read the order.]

This is the order that is sought to be quashed, and the ground upon which it is assailed before us is that the charges for the special expenses were put on an area not warranted by the Public Health Act—that is to say, it was put upon places that were not contributory places within the meaning of the Act; that in no view could a place be considered a contributory place unless it was benefited by the proposed work, and that in the particular instance a great portion of the area named in the Local Government Board order was in no way benefited by the work; and that the Local Government Board had not even determined that it was so benefited. By the order which is impeached, the Local Government Board put the area of charge on all the rural districts of Ballycastle, save and except Rathlin Island, and a certain locality called Townparks, which included the village of Ballycastle, which was already adequately equipped. They could not, without the consent of the Rural District Council, put it upon the whole of the rural district, but the very fact that there is this provision shows that they can put it upon a lesser area, provided, however, that this lesser area consists of contributory places within the meaning of the Public Health Act. What, then, is a con-

tributory place within the meaning of the Public Health Act? The 232nd section of that Act tells us. It says that the following places situated in a rural sanitary district shall be contributory places for the purposes of this Act, that is to say:—(1) The dispensary district; (2) the electoral division; (3) the townland; (4) such portion of any townland or townlands as may be determined by the Local Government Board.

This exhausts the description of contributory place. What, then, is the power of the Local Government Board? It is expressed as follows:—Provided that the Local Government Board shall have power to determine on what area of charge, being a contributory place, or consisting of contributory places, any special expenses shall be chargeable. This power made the Local Government Board paramount in grouping the contributory places, provided, of course, that the places were contributory places. According to the express terms of the section they were to have power to determine the area "consisting of contributory places" upon which the charge was to be put; the determination rested with them, and there is no limitation in the language; it does not say contributory places in which the works were executed, or were to be executed, and for whose benefit they were to be executed. Of course what I would call the central place, that is to say, the place where the works were done, or the water brought to, should be always within the area of charge. Now, as to this question of benefit, Mr. Harrison admitted that the charge could be put on a dispensary district, though portions of that district were not benefited by the proposed works.

It would appear to me that this added proviso, which was not found in the Act of 1874, was intended to give a paramount uncontrollable discretion to the Local Government Board, so far as grouping went, provided that in grouping the places grouped were within the rural sanitary district, and the physical description was complied with—that is to say, provided that the places grouped were dispensary districts, electoral divisions, townlands, or such portion of a townland or townlands as they determined. I certainly should have preferred that in this case the Local Government Board had set out *eo nomine* the localities charged. But the absence of a specification of the localities would not vitiate

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Lord O'Brien, L.C.J.

the order, and it is to be borne in mind that by the 261st section of the Public Health Act *certiorari* is taken away, and that it is specially provided that no order shall be quashed for defect of form.

It would appear to me that the order of the Local Government Board is right upon the face of it, and that they determined the very thing that they were authorized by the express language of the proviso to do. At the same time I think that the Local Government Board, notwithstanding *certiorari* being taken away, would not have power to put the charge upon a place not a contributory place within the meaning of the Act, for instance, on a place not within the rural sanitary district, and that if it could be shown that they had done so, the order could and should be quashed. But this has not been done, and could not be done, in in the present case, because it was admitted that the grouping that was effected by the order was a grouping of contributory places according to their physical description, and within the rural sanitary district. It was argued that the Act constituted as it were certain units of chargeability, and that the power of the Local Government Board was confined to determining the area of charge within the unit; for instance, that if the work was done within a dispensary district, it was within the power of the Local Government Board to determine whether the whole, or portion of the whole, district was to be made subject to the charge, but that they had no power to travel outside the unit; that in fact they had a discretion within, but not without, the unit. I asked whether they would have power in the case of works made within a dispensary district to extend the area of charge to a barony without the district. It was answered, and I think rightly, that this power existed. It would appear to me that if this were so, the contention that the power of charging should be limited to the unit in which the works were constructed was not well founded. The dispensary district would be the unit, and the barony *ex hypothesi* would be without it. It appears to me that the Legislature intended, and so expressed itself, that the Local Government Board should have a power of imposing the charge on a contributory place, or on a group of contributory places, according to the physical description given in the Act, and should have also the power of making that special combination of parts of a barony

and baronies referred to in No. 4 of what I may call the defining clause, and that it was not made a condition of the exercise of their jurisdiction that they should determine that grouped contributory places should have been, or would be, benefited by the works. No doubt the Legislature never contemplated that the special charge would be placed anywhere but on a place that was, or would be benefited by the works, but this they left to the uncontrollable discretion of the members of the Local Government Board, who, no doubt, were supposed to be men of sound discretion, who would not act arbitrarily or capriciously. The Legislature seemed, I think, to be somewhat apprehensive of the local bodies in the country, and introduced in Ireland the provision which is not to be found in the English Act. The difference between the English and Irish Act should never be lost sight of; it is the main factor in the controversy.

But now I will assume it was made a condition of the exercise of the jurisdiction of the Local Government Board in making the order they made, that contributory places should be places that were benefited by the works; in other words, that it was essential to the character of a contributory place that it was a place that was, or would, be benefited by the works. If this was so, and I assume for the purposes of the argument that it was, it was for the Local Government Board to determine. It was for them to decide whether the contributory places referred to in their order were benefited or not. I think that they did so decide. The exclusion of Rathlin Island from the area of charge shows they exercised discrimination as to what localities would or would not be benefited, and in the eighth paragraph of Mr. Swaine's affidavit it is stated that the order was made after a careful consideration by the Local Government Board of all the facts of the case; that was after a controversy had arisen as to whether the localities comprised in the area of charge would be benefited or not by the works. Even if they were wrong in the determination of that question, we could not control them. Certainly where *certiorari* has been taken away, the contention that we could review the action of the Local Government Board in reference to this question of benefit is wholly unsustainable. They had power to enter upon the inquiry, and the order was right on its face. In

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Heaphy's Case (1)—a much controverted case, as to the correctness of the decision in which I desire to say nothing whatever by way of approbation or derogation—the Lord Chief Baron was prepared to affirm the decision impugned until he discovered that *certiorari* was not taken away. The conditional order must be discharged with costs.

JOHNSON, J.:—

It is contended that the order of the Local Government Board, 11th September, 1902, is invalid on three main grounds—

(1.) That the Local Government Board had no jurisdiction to make that order;

(2.) That the order is bad on its face;

(3.) That it is an evasion (even if not a colourable evasion) of the Act, 63 Vict. c. 10.

On the first ground it is argued that under the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), s. 232, the expense of constructing a water supply "for the common benefit" "of any two or more contributory places within the district" is limited to such contributory places within the definition of "contributory places" in the section as are directly or indirectly supplied by means of the water brought into or through such "places," or, at all events, is limited to the "places" directly supplied with the water, and the "places" through which the water passes to its ultimate supply, whether such "places" are or are not supplied with the water. If this were so, there would be no necessity for empowering the Local Government Board to "determine" the area of a charge, because the fact is easily ascertainable locally in, through, and to what "places" or "place" the water in question is conveyed openly or by piping. But this section 232 of the Irish Act is borrowed and almost copied from section 229 of the English Act (38 & 39 Vict. c. 55); it differs materially from the English Act by the important proviso in the concluding paragraph of section 232 of the Irish Act, vesting in the Local Government Board in Ireland "power to determine on what area of charge, being a contributory place, or consisting of contributory places," any "special expenses" "shall be chargeable." Section 232 of

(1) 22 L. R. Ir. 500.

the Irish Act defines "special expenses" to be (*inter alia*) the providing a supply of water to any contributory place within the district, and also defines "contributory place or places" by the four enumerated classes mentioned in the section. Thus the Local Government Board is constituted the central authority in Ireland to determine "the area of charge" for the special expenses of the work in every such case: the area being "a contributory place," or "consisting of contributory places," of the defined classes.

In the discharge of their duty in the exercise of this important power, the experience of the Local Government Board, derived from their extensive sources of information from every part of Ireland, enables the Board to act on a general plan in the interest of the public health, subject to such application of their general principle to the special circumstances of each particular locality in respect of which they are required to exercise this power as on due consideration of the circumstances of the individual case the Board may in their discretion consider necessary or expedient. In the present case it appears by Mr. Swaine's affidavit that the Local Government Board carefully considered the circumstances of a water supply to Cushendall in all its aspects in reference to the public health, both as regards the benefit of Cushendall and of the other "contributory places" in the rural district, and then made the order, the validity of which is now challenged, and decided that under the circumstances the townlands of Ballycastle and the Island of Rathlin ought not to be included in the area of charge, but that in the interests of the public health the proposed water supply for Cushendall was not merely for the benefit of Cushendall, but also for the common benefit of other "contributory places" (except as mentioned) in the rural district, though not to the extent of the special benefit to the contributory place of Cushendall, and even though some of these contributory places might not have the actual use of the water, and though others of these contributory places would be beyond the radius of the water supply to Cushendall, and determined the area of charge accordingly. The Local Government Board considered that the limited area of Cushendall could not bear the whole expense of this work, and presumably considered that if it was not carried

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Johnson, J.

out, any of the epidemics which unhappily are not unknown in Ireland might break out in Cushendall, for want of a wholesome supply of pure water there, and spread through the rural district, and in the exercise of their proper (I decline to adopt the term "arbitrary" which counsel used) discretion determined the area of charge accordingly: the contributory places in the rural district comprised in the determined area participating, in the opinion of the Board, in the common benefit of the water supply to Cushendall. Such determination of the area does not, I think, interfere with the power given by the 232nd section to the Rural District Council to apportion the expense of constructing and maintaining the work as they think just between the contributory places. Without following elaborately Mr. Harrison's argument, I agree that it is plain the Local Government Board cannot, without the consent of the Rural District Council, determine that the whole rural district shall be the area of charge: 63 Vict. c. 10, section 1 (2); but they have not done so in this case, and it is for the Local Government Board to determine, subject to this limitation, what contributory places shall constitute the area of charge.

Then it is contended that the order is bad on its face—first, because it does not show jurisdiction by averring due inquiry into the circumstances of the particular case; and next, because it does not enumerate *seriatim* in terms every contributory place which together constitute the determined area of charge. As to the first objection, the statute does not in terms require inquiry and investigation by the Local Government Board into the particular circumstances, and Mr. Swaine's affidavit shows they were in possession of the circumstances on which they acted, and even in the absence of evidence to the contrary, it is to be presumed that the Local Government Board duly discharged its functions and its duty.

The second objection is a mere matter of drafting; it seems precisely the same in effect whether each component part of the determined area is enumerated and named, or whether the whole rural district, except certain enumerated and named contributory places, is made the determined area. The latter is probably the neater drafting, as the contributory places in the Ballycastle Rural District are as much public and common knowledge as the baronies

of a county. Then it is contended that the order is an evasion of the spirit, if not of the letter, of the 63 Vict. c. 10. I am not certain that I quite appreciate this argument; it involves either that the Local Government Board, a public department, has set the Act at defiance, which is an improbable, if not impossible, suggestion, or has colourably and deliberately evaded the Act by determining an area of charge which is practically the entire rural district, the excluded portions being comparatively so small as to be almost within the maxim *de minimis non curat lex.* This hardly merits observation, and the facts show that there is not the least foundation for such a suggestion.

I am satisfied on the facts before the Court by affidavit that the Local Government Board duly considered the facts of this particular case, and in the due exercise of the discretion vested in them concluded that the townlands of Ballycastle and Rathlin Island ought not to be included in the area of charge as "contributory places," and therefore have determined an area of charge which does not comprise the whole of the rural district, and had jurisdiction to make and publish, and did in due exercise of their statutable authority make and publish, the order of the 11th September, 1902.

KENNY, J.:—

Several questions have been argued in this case. The Local Government Board contend that having regard to the 261st section of the Irish Public Health Act, 1878, which takes away *certiorari*, the latter does not lie, inasmuch as the Board had jurisdiction to enter on the inquiry which resulted in the order that is impeached. If *certiorari* be applicable, the Ballycastle Rural District Council say that the order is bad, because the Board was bound under the 232nd section of the same Act to consider the question of common benefit to be derived from the special expenses in a case of contributory areas, and that it has not done so. Furthermore, it was said—though I think the contention was subsequently qualified, if not indeed abandoned—that no area could be made chargeable with "special expenses" except the particular unit of the smallest extent which receives a direct and immediate benefit by the outlay. The argument presented by the Local

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Government Board is that they are complete masters of the situation under the 232nd section, and that they have an absolute discretion as to the area of charge vested in them, which discretion they are entitled to exercise without entering into the question of common benefit.

The Board further say that if the question of common benefit has to be considered, the affidavits establish that they have applied their corporate mind to the question, and have determined the matter after due consideration. While concurring with my Lord Chief Justice in the view he has expressed, I do not propose to discuss the question as to the right to *certiorari* to quash an order like the one under consideration, purporting to be made under this section, inasmuch as I have formed the opinion that the present order cannot be successfully impeached. In my judgment the Local Government Board has absolute power under the section to arbitrarily fix the area of charge, so long as that area does not cover the whole of the rural district. To make the latter liable would, under the Public Health Act of 1900, 63 Vict. c. 10, require the consent of the District Council. The provision as to common benefit does not occur in the clause which gives the Local Government Board power to select the area, and is to be found only in the paragraph which enables the Rural District Council to apportion the expenses between contributory areas. But if the Board were obliged to consider the question of common benefit, it is clear, to my mind, that they have done so. They, no doubt, have established a general principle for their guidance in these cases, but here they had all the objections of the local authority prominently brought to their notice, and the affidavit of their Secretary states that they arrived at their determination after a careful survey of all the facts. The exclusion of Rathlin Island and Townparks demonstrates that the Board must have considered the specific case. I concur in thinking that the conditional order should be discharged.

J. G. T.

The Ballycastle Rural District Council appealed (1).

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R. F. Harrison, K.C., Healy, K.C., and *Megaw,* for the appellants :—

The cost of constructing and maintaining these works are "special expenses" within section 232 of the Public Health Act. The Local Government Act, 1898, section 59, sub-sec. 1, b (ii.), shows that "special expenses" were excepted from the general rules created by that Act making expenses chargeable over the whole district. The proviso at the end of section 232 of the Public Health Act gave the Local Government Board the power to say what area should be charged—the dispensary district, the electoral district, the townland, or portions of a townland. That does not authorise them to aggregate several of these units together for the purpose of the charge. The power given to the Local Government Board by the concluding clause of section 232 of the Public Health Act of 1878 is to be read along with the definition of "special expenses" in the earlier part of the section, which provides that "special expenses" are to be expenses of construction and maintenance in a contributory place, and that shows that this must be a place within which the work was to be executed. There was no power to impose a charge for a water-rate on any units except those to which the water is brought, or for sewerage rate on any except those in which the sewers are.

The fact that the Local Government Board have been obliged to procure an Act of Parliament to validate the former sealed order of 1899 shows that that order was beyond their powers under section 232 of the Public Health Act, 1878.

Furthermore, the Act, 63 & 64 Vict. c. 10, provided that the Local Government Board should have the power of charging the entire rural district with the cost of works, with the consent of the Rural District Council: that shows that the Board have not the power of aggregating two or more of the units mentioned in section 232 of the Public Health Act without such consent.

Even assuming that the Local Government Board had the power of aggregating all these units for the purpose of the charge.

(1) In the Court of Appeal, before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

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they never exercised their discretion as to the propriety of the course which they adopted. No preliminary inquiry was held, or any other course adopted for the purpose of ascertaining the propriety or fitness of fixing this area of charge.

Further, even if the Local Government Board had power to make the sealed order of 11th September, 1902, the time had not arrived for making it. Section 232 presupposes that the works have been finished: it is impossible to apportion the expense until the amount is ascertained.

Campbell, S.-G., *Chambers, K.C.*, and *Chaytor*, for the Local Government Board:—

The last point of argument of the appellants is not open to them: it was not mentioned in the conditional order, or in the Court below.

"Expenses" are divided into two classes by section 232 of the Public Health Act—general and special. Special expenses are then defined; but that portion of the section made no provision for providing for expenses in the case of more places than one. If the special expenses affect more places than one, then the Local Government Board have to determine upon what places the expenses shall fall. It is impossible to contend that the town of Cushendall is the only place that would be benefited by a new water supply, or new sewage works: the benefit would extend to the surrounding district. The proviso at the end of section 232 imported the previous provision as to common benefit. The power which the Local Government Board has to extend the area of taxation is not confined to any one of the four classes mentioned in the section: it is in the power of the Local Government Board to combine two places together: *Horn* v. *Sleaford Rural Council* (1). The policy of the Legislature, as shown in the Local Government Act of 1898, was to extend the area of rating as far as possible: charges which were formerly special are now charges on a contributory area.

The Act, 63 & 64 Vict. c. 10, was partly an enabling and partly a disabling statute; on its true construction, it deprived the Local Government Board of powers which it had before.

(1) [1898] 2 Q. B. 358, 367.

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Dec. 21.

LORD ASHBOURNE, C. :—

This is an appeal from an order of the King's Bench Division, refusing to quash a sealed order of the Local Government Board dated the 11th of September, 1902. Whether the writ of *certiorari* could be properly granted under the circumstances of this case appears to have been discussed in the King's Bench Division, but it was not argued before us. The facts of the case are simple enough. It became necessary to provide a new water supply and a new system of sewers for the village of Cushendall, situated in the Ballycastle Rural District. The Rural District Council, which is the Sanitary Authority, was quite prepared to carry out the work, but a serious controversy arose between the Council and the Local Government Board as to the area upon which the expense should be charged. After considerable correspondence the Local Government Board finally made the order of 11th September, 1902, by which they purported to determine that the area of charge should be the whole of the rural district with the exception of two townlands.

The Rural District Council strenuously argue that this order was *ultra vires*, on the ground that under section 232 of the Public Health (Ireland) Act, 1878, in pursuance of which it was made, the area of charge should be confined to "a contributory place or contributory places" "in or in respect of which" the works are executed. So that the substantial question submitted to us is, what are the powers of the Local Government Board in fixing the area of charge for special expenses under this section of the Public Health Act?

The provisions of that section which are material are included in those dealing with "special expenses," and are as follows:— "Special expenses shall be the expenses of the construction, maintenance, and cleansing of sewers in any contributory place within the district, the providing a supply of water to any such place, and" . . . . "all other expenses incurred or payable by the Sanitary Authority in or in respect of any contributory place within the district, and determined by the order of the Local Government Board to be special expenses."

The Act makes a strong contrast between "general" expenses, which have a common fund for their payment, and "special"

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expenses, which are attributed to definite areas, and it would appear to be *prima facie* opposed to the words and the policy of the legislation to put these on the very same area as the "general" expenses.

Why is it that special expenses are carefully limited to expenses incurred in or in respect of a contributory place? Because apparently it was the intention that the contributory place should be responsible for them. That would be a clear and intelligible object. This view is strengthened by the succeeding paragraph of the section, which provides that where special expenses are incurred for the common benefit of two or more contributory places, the Sanitary Authority may apportion such expenses between them. This provision would seem to indicate that each contributory place is to be responsible for its own special expenses.

But later in the section there is an express provision as to how special expenses are to be borne, which is in these words:—"Special expenses shall be a separate charge on some contributory place or places." As it would be absurd to contend that the area of charge could be so determined as to exclude the area in or in respect of which the special expenses were incurred, it is manifest that there must be some limitation to the apparent generality of these words, and, having regard to the general scheme of the section, I think that the contributory place or places here referred to must mean a contributory place, or contributory places, in or in respect of which the special expenses were incurred.

The definition of a contributory place is:—"The following areas situated in a rural sanitary district shall be contributory places for the purposes of this Act; that is to say—(1) the dispensary district; (2) the electoral division; (3) the townland; (4) such portions of any townland or townlands as may be determined by the Local Government Board."

Then follows the proviso on which the Local Government Board mainly rely—"Provided that the Local Government Board shall have power to determine on what area of charge, being a contributory place, or consisting of contributory places, any special expenses shall be chargeable." It was contended on behalf of the Local Government Board that this proviso gave

them an absolute and unqualified discretion to determine the area of charge, *provided* that it consisted of contributory places. But that discretion is, I think, clearly controlled by the preceding portions of the section, and the area of charge must consist of a contributory place or places in or in respect of which the special expenses are incurred, the function of the Local Government Board being confined to the determination of which of the four units they will select. If the contention of the Local Government Board were right, they would, having regard to the definition of "contributory place," have power to determine that the whole or any part of the rural district should be the area of charge, and it is difficult to see why all the elaborate provisions as to contributory places throughout the section were ever inserted.

The use of the words "contributory places" in the plural has been suggested as an argument against this construction, but I do not think that there is any substantial difficulty. There might easily be special expenses incurred in or in respect of a dispensary district which the Local Government Board determined to be justly chargeable only on two or three electoral divisions within that district, or when the apportionment clause was applied.

I cannot see that section 2 of the Public Health (Ireland) Act, 1900, which enacts that the Local Government Board may, with the consent of the Rural District Council, determine that the whole district shall be the area of charge, has much bearing upon the question here: but it indicates that in the opinion of the Legislature the Local Government Board had not power under the Act of 1878 to make the whole district the area of charge.

There is no other enactment bearing on the question, as these expenses are excepted from the operation of section 44 of the Local Government (Ireland) Act, 1898, by section 57 of the same Act.

Mr. Healy made the bold argument that the order and action of the Local Government Board were entirely premature until the expenditure was authorised, and I am by no means sure that the argument might not have been entitled to much consideration, if the objection had been taken earlier.

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Various other arguments were advanced, but they had reference mainly to questions of policy and convenience, which could not control the construction of the Act of Parliament, or affect our decision on points of law.

I think the order of the Local Government Board should be quashed, and the appeal allowed, with costs.

FITZ GIBBON, L.J.:—

I concur with the Lord Chancellor in holding that the order must be quashed upon the main ground of argument, namely, that upon its face it exceeds the geographical limits of the largest area of charge which the Local Government Board has jurisdiction to tax.

I treat the point raised by Mr. Healy as not open upon the conditional order: it was not made in the Court below; and here, the counsel for the Board declined to answer it, relying entirely upon its not being open. If there be no answer to it, it may be a consolation to the Board for the quashing of the order on other grounds, that the point might have been raised hereafter if the order had escaped now.

In my opinion the last clause of section 232 is in the nature of a definition of the words "contributory place," where they occur previously in the section. The question comes to this—Whether the words "within the district," which immediately follow "contributory place" in the third paragraph, and the words in the same paragraph, which confine "special expenses" to "sewers *in*," and the "supply of water *to*," a particular "contributory place," must not also qualify and be satisfied by whatever "area of charge" the Board determines to tax under the last clause. I think it clear that they must. The "area of charge" defined by the Board to be a "contributory place" must still be an area in which sewers are to be constructed, maintained, or cleansed, or to which water is to be supplied.

The power of the Local Government Board in the case of a contributory place in which sewers are, or to which water is, supplied, is confined to selecting one of the four areas specified in the last clause: these areas are *concentric*—as it were—No. 1 being the largest, and the locality of the sewers or water being the

centre. These "special expenses" are to fall upon the place benefited, and provided the Board does not go beyond the largest area named in the last clause, it may determine how far the taxation shall extend. But the condition, and the reason, of fixing the area are that it includes the place where the sewers or the water are.

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This order is bad on the face of it, because it goes far beyond the largest of the areas, and takes in practically the whole north-east of Antrim, with the curiously dissimilar exceptions of the Island of Rathlin and the town of Ballycastle.

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The Local Government Board appears to have got the idea that "the policy" of the Local Government Act, 1898, justified it in extending the area of charge for "special expenses" incurred under the Act of 1878. Union Rating was expressly provided for in certain cases. But the power of taxing whole Rural Districts for special expenses by sealed orders was not conferred, and if conferred it would have gone far to put an end to Local Government, and to transfer the power of taxation to an office in Dublin.

The Board seems to have exercised this power in some instances, and in particular by the three orders which were specially validated by Parliament; but the terms of the Act of 1900 (63 Vict. c. 10) seem to me to imply that all such orders, except those expressly validated, were bad; and that none such could be made in future without the consent of the Rural District Council.

The "common benefit" clause does not help the Board's argument: it deals with the case of more than one "contributory place," but the condition of benefit to *each and every* "contributory place" where several are benefited—viz. that the expenses are incurred for sewers *in* it, or water supply *to* it—remains the same as in the case where only one contributory place is benefited. The fact that special expenses are frequently incurred for the benefit of more Dispensary Districts than one, or for areas including parts of two or more Dispensary Districts, supplies the reason for the "common benefit" clause, and at the same time explains the mention of "contributory places" in the plural in the last clause. But the words "consisting of contributory places" in the last clause do not *per se* empower the Local Government Board to tax

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any aggregate of dispensary districts, electoral divisions, or other areas, unless each area taxed answers the condition or description of being a place in which sewers are to be constructed maintained or cleansed, or to which water is to be supplied.

For these reasons I am of opinion that this attempt by Executive Authority to tax all North-east Antrim, except one little island, and a town that has already been taxed for its own water and sewers, for the cost of providing water and sewers for the village of Cushendall, is illegal. It is really an attempt to do, against the well-reasoned remonstrances of the Local Authority, what the Act of 1900 provided should be done only with its consent.

So far as Rathlin is concerned, the Board might as well have excepted Carrick-a-Rede, and the exception is, in my opinion, illusory.

WALKER, L.J.:—

The only question which I propose to deal with is whether the sealed order of the Local Government Board of 11th September, 1902, is one which that Board could lawfully make. That question almost entirely depends upon the true construction of the 232nd and 233rd sections of the Public Health Act, 1878.

The Board contend that under these sections they could lawfully impose special sanitary charges on the whole Rural Sanitary District of Ballycastle, less a nominal part—the Island of Rathlin and the Ballycastle townlands—in order to repay expenses incurred for a water supply to the town of Cushendall.

The Rural District Council, for reasons which, if we were at liberty to go outside the law of the case, are at all events worth considering, contend that the order would work injustice, but they also assail it as illegal.

The 232nd section, which is the basis of the order, is conversant with, so far as material here, the "special expenses of a Rural Sanitary District," and the third clause of the section deals with —(1) their nature; (2) the area on which the charge shall be, or over which it shall range. As to their nature, they are sewers in any contributory place, water supply in any contributory place, and some others, and all other expenses determined to be special expenses incurred in or in respect of any contributory place. Thus

we have the sanitary works localized, by reference to "contributory places," and these we find defined as follows:—"The following areas situate in a rural sanitary district shall be contributory places for the purposes of this Act, that is to say—(1) *the* dispensary district; (2) *the* electoral division; (3) *the* townland; (4) such portions of any townland or townlands as may be determined by the Local Government Board." If we read those in with the clause defining the nature of the works they will read—Sewers, or supply of water in "the dispensary district," or any other unit. The first three units have definite metes and bounds. The fourth is only defined when the Local Government Board marks it out, and it may overlap 2 and 3, and may embrace townlands in two electoral divisions. I think the definite article, preceding the units, points to a work within it, the doing of which leads up to the corresponding and consequential charge.

The Act makes a marked distinction between "general expenses," which have a common fund for their payment, and "special expenses," which are attributable to limited and defined areas, and *prima facie* it is contrary to the spirit of the legislation to throw them on the same area as general expenses.

I am careful to distinguish between the policy of the Act and the policy of its administration, with which, however well-meaning, we have nothing to do.

The clause in the Act authorising apportionment is, I think, an argument in favour of the opinion which I have formed, because it fortifies the view that benefit to a contributory place lies at the root of the charge. It would hardly be necessary, if the arbitrary power under the proviso existed of making the whole rural district, except a nominal part, the area. Apportionment on a contributory place presupposes that without it you are dealing with the definite unit. When the apportionment is made, then we have "special expenses legally incurred in respect of such contributory place."

This enlarges the object with which the works are commenced, and the legal incidence. The mode of keeping the accounts and receipts points in the same direction.

Now we come to the proviso on which the power of the Board

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is mainly said to arise. There is no doubt a large power of determining the area of charge is given, but that area is limited to "a contributory place, or consisting of contributory places," and we are, therefore, referred back to the units immediately preceding. They may select the largest or smallest unit, or they may, by working under No. 4, extend the area into one of the other units. Thus we have a subject-matter for the words in the plural, "consisting of contributory places," as we also have from the apportionment clause, but I wholly fail to see how they can make all the dispensary districts, except a nominal part, the area. I cannot read the proviso as meaning such partition of the rural sanitary district as they may think fit, provided it is not in form the whole. Units would cease to exist as a measure of power if that were so, but the proviso incorporates the units as a limitation.

The Act of 1900 was relied on by counsel for the Local Government Board. It seems to me a strong argument against them. I read it as implying that without the consent of the local authority they had no power to go outside units defined in the principal Act, though I quite agree that there is no power to question their determination of how far benefit extends for the purpose of fixing the area within the prescribed limits. If the contention of the Board is correct, sub-section 2 of the Act of 1900 was not needed, for the consent of the local authority need never practically have been sought.

Sitting here, I am precluded from entering upon the debatable questions involved in the policy of the Board. In point of law, I feel bound to concur in quashing the order.

HOLMES, L.J.—

The sealed order of the Local Government Board, dated the 11th September, 1902, which it is sought to quash in these proceedings, was preceded by a controversy of considerable duration between the Board and the Ballycastle District Council in relation to providing Cushendall with a water supply and a proper system of sewage. Cushendall is a village, having a population of about 400, situate near the southern extremity of the Ballycastle Rural District; and the necessity for sanitary improvements therein has

been for some years past urged by the inhabitants, and not disputed by the District Council.

A difference, however, arose as to the area upon which the expenses of the proposed works should be charged, the Local Government Board asserting that these expenses should be borne by the whole rural district, while the council contended that they ought to be confined to the place immediately benefited. Many communications passed between the central and the local authority, in which the respective views of each were advocated with intelligent earnestness; but as there seemed no prospect of agreement, the Board issued the order of September, 1902, which I gather from the correspondence and from Mr. Swaine's affidavit was intended to be preliminary to the exercise of the powers conferred by the 15th section of the Public Health (Ireland) Act, 1896, if the council continued recalcitrant. The recital in the order that "the council have incurred or are about to incur special expenses" is hardly justified by the facts; and Mr. Healy has argued that an order determining the area of charge is premature until expenditure has been authorised. But as this objection was not taken in the Divisional Court, and as I think the sealed order bad on other grounds, it is unnecessary to deal with it. The only question I propose to consider is, what are the limits (if any) to the authority of the Local Government Board in determining the area of charge for special expenses incurred by a rural sanitary authority in the execution of the Public Health Acts. This depends entirely upon the provisions of sections 232 of the Public Health (Ireland) Act, 1878. These provisions are still in force, and have not been modified by subsequent legislation, except on one point, which for the purposes of the present case is immaterial. The Local Government (Ireland) Act, 1898, made no change, for although section 44 thereof provided that all expenses incurred in relation to the business of the council of a rural district, including expenses connected with any public work in the district not leviable off the county at large, should thereafter be raised equally over the whole district, there is excluded from this enactment by section 57 special expenses leviable off a contributory place in a rural sanitary districst under the Public Health Acts. The modification which I have described as immaterial for my present purpose is to be found

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in the Public Health (Ireland) Act, 1900, section 2, which authorises the Board, with the consent of the council of any rural district, to determine that the whole district shall be the area of charge for such special expenses as aforesaid.

We are therefore only concerned with one section, the 232nd of the Act of 1878, which follows with some variations the language of section 229 of the English Public Health Act of 1875. It begins by dividing the expenses incurred by a rural sanitary authority in the execution of the Act into general expenses and special expenses. Then, after defining general expenses, it sets forth under six heads what are special expenses, that is to say—expenses of (1) the construction, maintenance, and cleansing of sewers in any contributory place within the district; (2) the providing a supply of water to any such place; (3) the providing, repairing, and cleansing public wells; (4) the lighting, where duly authorised; (5) arising out of or incidental to the possession of property transferred to the rural sanitary authority in trust for any district or contributory place; and (6) all other expenses incurred or payable by the sanitary authority in or in respect of any contributory place within the district, and determined by the order of the Local Government Board to be special expenses.

It is to be observed that in each head of this enumeration the expenses mentioned are expenses incurred or payable in respect of any contributory place. In the case of the first and second heads, it is expressly stated that the sewers are to be in any contributory place, and that the water supply is to be to any such place; and I think it is equally clear from the general words in the last clause—"all other expenses incurred or payable in or in respect of any contributory place within the district"—that a similar condition attaches to every class of special expenses. Thus far there is no definition of a contributory place, and to find a definition we must go to the end of the section, passing over for the present two intervening clauses that deal with exceptional cases. "Special expenses," it is enacted, "shall be a separate charge on some contributory place or places." Reading these words with what has gone before, they must mean some contributory place or places in or in respect of which the expenses have been incurred or are payable. Then

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follows the definition:—"The following areas situated in a rural sanitary district shall be contributory places for the purpose of this Act, that is to say—(1) the dispensary district; (2) the electoral division; (3) the townland; (4) such portions of any townland or townlands as may be determined by the Local Government Board. Here again, if this definition is to be brought into harmony with the previous part of the section, we must assume in the case of each of these units of charge that it is a place in or in respect of which the expenses have been incurred or are payable. If the section stopped here, it would be impossible to say on which of the four specified areas the expenses were to be charged; but this difficulty is removed by the final proviso that the Local Government Board "shall have power to determine on which area of charge, being a contributory place, or consisting of contributory places, the special expenses shall be chargeable." The controversy turns on this proviso. Counsel for the Board contend that it is given a discretion to place the charge on either the entire of the rural district or on such portion of it as it may determine, while it is argued on behalf of the Rural Council that its discretion is limited to the selection of one of the units named. The Board may take as the area of charge the dispensary district, or the electoral division, or the townland, or the portions of townlands in or in respect of which the expenses have been incurred or are payable. Going through the several provisions, and giving, as I think I have given, to each its full and proper meaning, I have arrived at the last-mentioned conclusion. The only apparent objection to this construction is that the section contemplates that the charge may fall on contributory places as well as a contributory place. But this is explained by the two antecedent clauses, which up to the present I have not examined. They refer to the sanitary authority making sewers or providing a water supply or executing a work under the Act for the common benefit of two or more contributory places within the district. In such cases the sanitary authority may, subject to appeal to the Local Government Board, apportion the expense in such proportions as it thinks just between such contributory places. In all these cases the special expenses would be a charge on two or more contributory places. I asked more than once during the argument why, if the Board's

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construction be correct, there is the elaborate provision as to the four areas being contributory places for the purposes of the Act; why "a contributory place" was introduced at all, why there was not a simple provision that special expenses shall be a separate charge upon either the entire rural district or such portion thereof as the Local Government Board shall determine; but to these questions I received no answer. Looking at the section as a whole, I am led to the same conclusion as I have reached by an analysis of its several provisions, and therefore I am of opinion that the appeal ought to be allowed.

I have dealt with the case upon the first ground stated in the conditional order, and the only ground relied on by the appellants in this Court. The conditional order states as a second ground for quashing the order that the Local Government Board has no power to determine that any place not benefited by the expenditure is a contributory place. I can find in the section no such limitation to the jurisdiction of the Board. Whatever be the measure of its jurisdiction, it is given absolute discretion, as long as it keeps within it. If the Board possesses the wide power, which it claims, to determine the area of charge, it would be reasonable for the rural authority to urge that such area should be confined to the place benefited; but there may be counter considerations of equal or greater weight that ought to be taken into account. I agree with all that was said on this subject in the Divisional Court, and I have not been influenced by it in any way.

I desire to add a few words on a topic with which we were much pressed during the argument. It was said that the Local Government Board has always acted on the assumption that it had jurisdiction under the Act of 1878 to determine that the whole district or any part thereof was the area of charge, and that a contrary decision would lead to great confusion. This is a strong reason for the exercise on our part of caution; but if we form, however reluctantly, the opinion that the Board has misconceived its powers, we are obliged to say, notwithstanding the chaos which Mr. Chambers has threatened, *fiat justitia*. It is, however, satisfactory to think that no such dreadful consequences will follow from our judgment. It appears on a few—a very few—occasions between 1878 and 1898, the Board determined that

the area of charge for special expenses should be all the electoral divisions in the district. After the passing of the Local Government Act of 1898, the Board made two orders, dated the 15th May, 1899, and the 17th July, 1899, respectively, altering in many instances the area of charge for special expenses, and substituting for the previous areas the whole rural district. These orders were bad for, I think, two reasons, and at least, as the Solicitor-General admits, for one. Yet there was no return of chaos; and the orders were declared valid by the Public Works Loans Act, 1899.

By a statute of the following year, to which I have already referred, the Board was authorised, with the consent of the rural council, to alter any area of charge for special expenses theretofore determined with like consent, or to determine that the entire rural district shall be such area. It appears from Mr. Swaine's affidavit that the policy approved of by the Board is to place the special expenses upon the rural district as a whole; and I assume, although we have no information on the subject, that between 1898 and 1900 there were some isolated orders of this kind in addition to the two comprehensive orders validated by Parliament. But there ought to be no difficulty in setting right these orders as well as the other orders, made previous to 1898, to which I have referred. If the rural council now consents, new orders to the same effect as those now in existence can be made. In any case in which such consent cannot be obtained, there can be a new order declaring the area of charge to be the dispensary district, the electoral division, or the townland in or in respect of which the expenses were incurred or are payable. Thus all risk of confusion can be avoided by reasonable administrative action.

I desire to add that, although I have not used the Act of 1900 as throwing light on the powers possessed by the Board previous to its enactment, it certainly suggests that then for the first time jurisdiction was given to charge the whole district, and the rural council might well be surprised that while its consent was necessary to making the Ballycastle Union the area of charge, the Local Government Board, by excluding from the Union, which contains 102,000 acres, one townland of about 600 acres, and a small island, two-thirds of which, according to the topographical dictionary of

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Mr. Lewis, consist of rocks and stony pasture, could get rid of the necessity for such consent.

Solicitors for relators: *P. & J. Boyle.*

Solicitors for Local Government Board: *T. Tighe Mecredy & Son.*

R. D. M.

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Jan. 14, 15, 19, 27.

DUMIGAN, APPELLANT; WALSH, RESPONDENT (1).

Licensing Acts—Sale of intoxicating liquors—Assignment of licensed premises—Ad interim order made at Petty Sessions—Transfer refused at Quarter Sessions on ground of character of applicant and unsuitability of premises—Re-assignment to original licensee—35 & 36 Vict. c. 94, s. 3—18 & 19 Vict. c. 114—3 & 4 Wm. 4, c. 68, s. 4—37 & 38 Vict. c. 69, s. 12, sub-s. 1.

A held a publican's license for the period of twelve months from the 10th October, 1902, in respect of certain premises which he held under lease for a term of years, subject to a mortgage. In February, 1903, A and the mortgagees executed a deed, assigning the premises, license, and goodwill to B, who executed a fresh mortgage to the same mortgagees. A also purported to assign the license to B by endorsement. A gave up possession to B, who obtained the usual *ad interim* order at Petty Sessions, to remain in force until the next (April) Quarter Sessions, and B proceeded to carry on the trade of a publican in the premises. In April, 1903, shortly before the Quarter Sessions, B was convicted of an offence against the licensing laws. At the April Quarter Sessions the police opposed the transfer of the license to B, and the Justices refused to grant it, on the grounds of the unsuitability of the premises and the character of the applicant. B then conveyed all his interest in the premises, license, and goodwill to the mortgagees, who subsequently, on the 16th May, 1903, let the premises to A for six months. A went back into possession, and resumed his trade as a publican. He was summoned, under section 3 of the Licensing Act, 1872, for having, on the 26th May, 1903, sold intoxicating liquors without being duly licensed:—

Held, that A was not liable to be convicted of the offence.

CASE STATED by the Justices of the county of Armagh, under 20 & 21 Vict. c. 43.

(1) Before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

The following statement of the facts is taken from the judgment of Wright, J. :—

"The defendant was summoned under sect. 3 of the Licensing Act, 1872, for having, on the 26th of May, 1903, at Keady, in the county Armagh, at his residence in Main-street, Keady, sold by retail intoxicating liquor without being duly licensed to sell the same. At the hearing the majority of the magistrates were of opinion that, upon the evidence, the defendant ought to be convicted, but, at the request of his solicitor, stated a case for the opinion of this Court, as to whether they were correct in point of law in their determination. The facts, which are uncontradicted, may be shortly stated. The defendant Dumigan held an ordinary publican's license, for sale by retail of intoxicating liquors in the house and premises in Main-street, Keady, mentioned in the summons, for the period of twelve months from October 10th, 1902, and occupied the house and carried on the business of a publican in it down to the 13th of February, 1903. He had previously, by deed, mortgaged the house and premises (which were held by him under a lease for a long term of years), license, and goodwill of the business, to Messrs. J. & J. M'Connell of Belfast, distillers, and on this mortgage there was due on the 13th February, 1903, the sum of £500. By deed of that date Messrs. J. & J. M'Connell, as mortgagees, and Dumigan, as mortgagor, in consideration of the sum of £500, stated to have been paid by Bernard Doherty to the mortgagees, assigned to Doherty the licensed premises and the license and goodwill of the business of publican; and, by another deed of the same date, Doherty mortgaged to Messrs. M'Connell the licensed premises, license, and goodwill of the business, to secure the sum of £450. On the same day Dumigan gave up to Doherty possession of the house, and went to live elsewhere. He also purported to assign the license to Doherty, by endorsement dated the 14th of February. On the 16th of February Doherty obtained from the magistrates at Petty Sessions a transfer of the license, under section 1 of the 18 & 19 Vict. c. 114, to remain in force until the next Quarter Sessions for the district next after the expiration of one calendar month from that date, which were fixed for the 22nd of April, 1903. Under this order Doherty, who was in possession

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and occupation of the licensed house, carried on the business of a publican during the months of February, March, and April. On the 16th of April, 1903, Doherty was convicted by the Justices at Petty Sessions of a breach of the licensing laws. On the 22nd of April his application for a transfer came on to be heard at Quarter Sessions, was opposed by the police on two grounds, and on both grounds—namely, unsuitability of the premises and character of the applicant—was refused. Immediately afterwards, and obviously in consequence of this refusal, Doherty by deed of the 29th April, 1903, released and, as beneficial owner, conveyed, to Messrs. M'Connell all his estate and interest—in other words, the equity of redemption—in the licensed premises, the license, and the goodwill of the business of publican. On the 3rd of May Dumigan, who for over two months had been out of possession, was put back by Messrs. M'Connell as weekly tenant to them, and on the 16th of May, 1903, the house was let to him, under an agreement in writing of that date, for six months from the 1st of May, at the yearly rent of £20. Dumigan, having got back into possession of the house, claimed the right to sell under the license granted to him in the previous October, and the summons in the present case is for selling there on the 26th of May, he not being a duly licensed person (sect. 3 of the Licensing Act, 1872). On these facts the majority of the Bench decided that the endorsement of the Justices in Petty Sessions on the 16th of February transferred the license to Doherty, and that Doherty having been refused a certificate at Quarter Sessions on the 22nd of April, the license was null and void, and convicted Dumigan; and the case has been stated for this Court to determine was such conviction right."

William M. Magrath (with him *Henry, K.C.*), for the appellant, the defendant below:—

The license was in Dumigan until October, 1903; a license once granted, can only be taken away under the provisions of some statute. The order made at Petty Sessions under 18 & 19 Vict. c. 114, s. 1, though called a transfer, is merely an authority to carry on the business of a publican until the next Quarter Sessions: under that order, Doherty did not become a licensed

person: *Andrews* v. *Denton* (1); *Lawrence* v. *O'Hara* (2); *Re Deighan* (3); *Brown* v. *Watson* (4); *Price* v. *James* (5). The proviso at the end of section 2 of that Act, that the person authorized to carry on the business is to be subject to the penalties and provisions of the Licensing Acts, shows that such person does not by the order made under section 1 become a licensed person, since if he did that proviso would be unnecessary. Under section 1 the magistrates have power to authorize any person to carry on the business independently of title or possession, the only restriction being that he is "not disqualified by law." These words refer to the disqualifications imposed by 3 & 4 Wm. 4, c. 68, section 13, and 6 & 7 Wm. 4, c. 38, section 2. The attempt to transfer the license by the deed of the 13th February, 1903, was a mere nullity. A license can only be transferred by the Excise authorities. Until the person to whom the license is purported to be transferred obtains a license from the Excise authorities in pursuance of the certificate mentioned in section 5 of 3 & 4 Wm. 4, c. 68, he does not become a licensed person. Doherty never was a licensed person; the license remained in Dumigan. Dumigan was, on the 26th May, 1903, in possession both of the license and of the premises to which it was attached; he cannot therefore be convicted for selling on that date intoxicating liquors without being duly licensed. [He referred to *Kelly* v. *Montague* (6).]

The Solicitor-General (*Campbell, K.C.*), and *Cecil Atkinson*, for the respondent, the complainant below:—

Having regard to the decision of the Court of Appeal in *In re Deighan* (3), we do not propose to argue that Doherty became a licensed person by virtue of the order made at Petty Sessions. Our contentions are—first, that Dumigan having by his own act determined his connection with the premises, and a new interest having supervened, the license, so far as he is concerned, was gone, and he ceased to be a licensed person. A license is a personal privilege attached to the premises; where the interest in respect of which that privilege was originally obtained has been parted with,

(1) [1897] 2 Q. B. 37.
(2) 67 J. P. 369; 47 S. J. 639.
(3) 31 I. L. T. R. 45.
(4) *Ante*, p. 218.
(5) [1892] 2 Q. B. 428.
(6) 29 L. R. Ir. 421.

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the personal privilege is forfeited: *The Queen* v. *Justices of Tipperary* (1), *per* Fitz Gibbon, L.J.; *The Queen* v. *Justices of Cork* (2), *per* Holmes, L.J. The interest in respect of which Dumigan obtained the license was an interest for a long term of years: that interest was never revived; the interest under which he went back into possession was a new interest for a term of six months. To entitle him to resume trading it was necessary he should apply to the magistrates either for a new license or a transfer. In *Andrews* v. *Denton* (3) there was no break in the possession; the respondent remained on in possession for some time after the protection order was granted, and it was while he was so in possession that the alleged unlawful selling took place. In *Lawrence* v. *O'Hara* (4) no fresh interest had supervened during the interval while the appellant was out of possession, and this fact is referred to by Lord Alverstone, C.J., in his judgment as reported in the *Solicitors' Journal*. In *Brown* v. *Watson* (5), Mrs. Watson was not a party to the transfer in any way. [They referred to *M'Donald* v. *Hughes* (6); *Ex parte Todd* (7).]

Secondly, the application for the transfer at Quarter Sessions was refused by the magistrates on the ground not merely of the character of the applicant, but of the unsuitability of the premises. Unsuitability of the premises means unsuitability for the conduct of the business of a publican: *The Queen* (*Marshall*) v. *Justices of Tyrone* (8). Dumigan by his own act put it in the power of the magistrates to make this adjudication that the premises were unfit for carrying on the business of a publican. That is an adjudication *in rem*, and continued to bind the premises, since it is not suggested that any change took place in their character between that adjudication and Dumigan's resuming possession.

Henry, K.C., in reply:—

Dumigan had got back possession of the premises and the license; what more could he have done to entitle him to trade? It is suggested that he was bound to apply to the Justices for either

(1) 6 L. R. Ir. 129, at p. 136.
(2) [1895] 2 I. R. 104, at p. 113.
(3) [1897] 2 Q. B. 37.
(4) 47 S. J. 639; 67 J. P. 369.
(5) *Ante*, p. 218.
(6) [1902] 1 K. B. 94.
(7) 3 Q. B. D. 407.
(8) [1895] 2 I. R. 174.

a new license or a transfer. He could not, however, apply under 3 & 4 Wm. 4, c. 68, sect. 2, inasmuch as he was licensed during the previous year; nor could he apply at Petty Sessions for a transfer from Doherty under 18 & 19 Vict. c. 114, sect. 1, for that section deals with the assignment of the interest of a duly licensed person, and it is admitted Doherty never was such. The only transfer that could be made under that section would be a transfer from Dumigan to himself, and it would be absurd to say that this was necessary.

As to the second contention, Dumigan cannot be affected by an adjudication made on an application by Doherty, to which he, Dumigan, was no party. An adjudication of this kind is not *in rem*. Take the case of the holder of a six-day license who wishes to have it changed to a seven-day license. His application must be for a new license: *The Queen* v. *Cathcart* (1). Suppose such new seven-day license is refused on the ground of the unsuitability of the premises, could it be argued that the six-day license was gone?

Cur. adv. vult.

Jan. 22.

LORD O'BRIEN, L.C.J.:—

This case presents for our determination an important question under the Licensing Law. The question is this—Can a person who was duly licensed as a publican for a year, but who purported to part with the license, and who actually parted with all his estate and interest in, and the possession of, the premises in respect of which the license was granted, lawfully carry on during the current year of the license the business of a publican on the same premises after he has got back the possession of them from the person to whom he has assigned the premises, where such person, though authorized to carry on the business by an *interim* authorization under the 18 & 19 Vict. c. 114, has failed to get at Quarter Sessions a transfer of the license, the application for a transfer having been refused on the ground of the unsuitability of the premises and character of the applicant? This is the question

(1) 4 L. R. Ir. 567.

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which we have to determine in this case, and it arises on the following state of facts: —

A man named Dumigan obtained in October, 1902, a publican's license to carry on business in the village of Keady, in the county of Armagh. On the 13th February, 1903, he and certain mortgagees named M'Connell by deed assigned all Dumigan's estate and interest in the premises to a man named Doherty, and by the same deed purported to assign to Doherty the license which Dumigan held, and all interest in it. After the execution of this deed Dumigan left the premises, and Doherty assumed possession of them. When so in possession, Doherty applied to the magistrates for an *ad interim* authority to carry on the business until the next Quarter Sessions, and on the 16th February, in the same year, this authority was granted by the magistrates to Doherty. In the interval between the 16th February, 1903, and the Quarter Sessions, Doherty was fined for a breach of the Licensing Law, and when he subsequently applied for a transfer at the Quarter Sessions, the presiding magistrates, on the 22nd April, 1903, refused to grant the transfer on the ground of the unsuitability of the premises and the character of the applicant. Some days after this application for a transfer was refused, namely, on the 29th April, 1903, Doherty re-conveyed to J. and J. M'Connell, Limited, the premises, and purported to assign to them the license attaching to them.

Subsequently, on the 16th May, 1903, J. and J. M'Connell by agreement let the premises to Dumigan for six months, and by the same agreement purported to re-assign the license to him. Dumigan went back into possession. It will be seen that by this deed of agreement, dated 16th May, 1903, Dumigan was, during the current year of his license, put back into possession of the premises he originally held, while he was licensed to carry on in them the business of a publican. He proceeded to trade as a publican, and was summoned for an alleged breach of the Licensing Laws, namely, for selling spirituous liquors without a license.

The question then which we have to determine is this—Was he justified in selling spirituous liquors after he got back into possession? Did the license which he originally got, and which was never transferred by an order of the magistrates, protect

him? We are unanimously of opinion that it did, and that the magistrates were wrong in convicting him.

It was sought to sustain the ruling of the magistrates on two grounds—first, that he parted, both as regards estate and possession, with the premises in respect of which the license was granted, and that once he divested himself of all estate in, and possession of, the premises, the license, so far as he was concerned, was killed. The second ground by which the magistrates' ruling was sought to be sustained was that Dumigan had put it into the power of Doherty to invite an adjudication of the magistrates as to the suitability of the premises for the particular business, and that inasmuch as the magistrates pronounced them unsuitable, this was in the nature of a judgment *in rem* against the premises, and that they could not during the current year be made available for carrying on the business of a publican, for which they had been pronounced unsuitable. These are the two grounds on which it is sought to sustain the ruling of the magistrates.

As to the first, the severance of the license from the premises—we are all of opinion that this severance did not kill the license—no doubt the severance did take place, and the licensee Dumigan endeavoured, as best he could, to divest himself of the license, but the license which was granted to him as a personal privilege by a public authority, the Magisterial Bench, could be transferred only by the Magisterial Bench, and it never was so transferred. The personal privilege remained with him upon whom it was conferred; no doubt as long as he had no possession the privilege was inoperative, because the person privileged was to carry on the business of a publican in a certain house, and he had not for the time being possession of the house in respect of which the privilege was granted; but, in my opinion, once possession came back rightfully to the licensee he was authorized to do what he was originally granted power to do, namely, to carry on the business of a publican in the particular house. It is true when the possession of the premises came back he had not the identical estate he had when the license was originally granted, but, in my opinion, lawful possession alone would suffice. No doubt when application for a new license is made to the Bench, the magistrates in the exercise of their discretion take into consideration the quality of the interest

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the applicant has in the premises, but when they grant the license it is a license, a personal privilege to carry on the business in the particular house whilst the licensee has the lawful possession thereof. A legal estate, strictly so called, in the premises is not, in my opinion, legally necessary. Lawful possession or lawful occupation is enough. Managers who are mere licensees of companies are licensed, not unfrequently, as being in lawful occupation, to sell spirituous liquors. I adhere to what I said in *The Queen* (*Murphy*) v. *The Justices of Cork* (1). In this case, however, it is not necessary to deal with mere lawful occupation as distinguished from lawful possession, as Dumigan was in sufficient possession under a letting for six months. The license, the personal privilege to trade, remained all through with Dumigan; it was not transferred to anyone else by the action of the magistrates, who alone had power to transfer it, and it could not be transferred by even the action of the magistrates from Dumigan to himself. Transfer implies the existence of two persons—the duly licensed person and the transferee. No physiological or psychological process could split up Dumigan into two Dumigans. His personal identity, his individual personality, remained throughout. Dumigan he was, and Dumigan he remained. He was a single unit with a personal privilege, operative when he was in possession of the premises, inoperative when not. He was, in my opinion, entitled to carry on the business of a publican when he got back the lawful, rightful possession of the premises.

The cases which have been referred to are of practically no value. They are distinguishable in their facts, and the passages referred to are of an ambiguous character. However, one passage in the judgment of Lord Justice Fitz Gibbon in *The Queen* (*O'Brien*) v. *The Justices of Tipperary* (2) was much pressed on our attention both by the Solicitor-General and Mr. Atkinson, where he states in effect that the licensee could no longer trade when there was a severance between the holder of the license and the premises; but it is plain, when the facts of that case are referred to, that the Lord Justice's observations were intended to apply only where there was an absolute, final, continuing severance between the original

(1) [1895] 2 I. R. 104. (2) 6 L. R. Ir. 129, at p. 113.

licensee and the premises, and that he did not intend to deal with a case such as the present, where the original licensee got back possession of the premises. Before I leave this branch of the case, I wish to refer to what took place during the course of the argument. Mr. Magrath, who opened the case on behalf of the appellant Dumigan, contended, citing *Deighan's Case* (1), in the Court of Appeal, that what Doherty got from the magistrates at Petty Sessions was not a transfer of Dumigan's license, but a mere authority to carry on the business of publican. Speaking for myself alone, I must say that, having regard to the language of the 1st section of the 18 & 19 Vict. c. 114, and to the form of the order of the magistrates, I entertained some doubt as to the soundness of Mr. Magrath's contention; but whilst my opinion was still wavering, and before it had at all crystallized into settled conviction, the Solicitor-General very candidly admitted that Mr. Magrath's proposition was established to be correct by the decision of the Court of Appeal in *Deighan's Case* (1); that he had argued the case himself, and that it was decided on the basis that under 18 & 19 Vict. c. 114, s. 1, the *ad interim* order of the magistrates is not a transfer of the license, but a mere authority to carry on the business for a limited time. This admission relieved me from further consideration of the point, and the argument proceeded on the basis of this admission. I need not therefore consider the question whether a transfer could have taken place by the action of the magistrates at Petty Sessions, and the license have expired when not carried on by the acceptance of Doherty as a transferee.

I now come to the second point, by which it is sought to sustain the ruling of the magistrates, namely, the adjudication of the magistrates at Quarter Sessions that the premises were unsuitable. The argument on this part of the case is certainly very plausible. Is Dumigan to be allowed to go back to trade as a publican in premises in respect of which he enabled Doherty to get an adjudication from the magistrates that they were unsuitable for that trade? On the instant one is inclined to answer that question in the negative, but I think, after consideration, that that answer would be erroneous. The adjudication by the magistrates that

(1) 31 I. L. T. R. 45.

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the premises were unsuitable did not operate as a forfeiture of Dumigan's license—it merely showed a want of qualification in Doherty to get a transfer, or rather, perhaps, I should say that the conditions were not present which would have entitled him to a transfer. The matter was prospective, not retrospective. Doherty should show that he was a man of good character, and that he was possessed of suitable premises. The question was in relation to Doherty's possession of suitable premises, and I think the adjudication came to this, and nothing more, that Doherty's application should be refused, as the conditions were not fulfilled to entitle him to a transfer. I am accordingly of opinion that the decision of the magistrates was wrong, and that the summons against Dumigan should be dismissed. Dumigan must get the costs of the argument.

MADDEN, J. :—

On the 10th October, 1902, one Dumigan, being then in lawful occupation of certain premises under a lease for a term of years, obtained from the Excise authority a publican's license, entitling him to sell intoxicating liquors on these premises for the period of one year. He is now prosecuted under the 3rd section of the Licensing Act of 1872 for selling intoxicating liquor without a license. The liquor was sold at the place where the sale was authorised by his license, during the currency of the year for which it was granted, and at the time of the sale Dumigan was in lawful occupation of the premises under a tenancy from year to year.

In the interval between the granting of the license and the sale in question, certain transactions had taken place with reference to the license and to the licensed premises, which, it is alleged on the part of the prosecution, had the effect either of cancelling or terminating the license; and the question for our determination is: Has it been established by the prosecution that Dumigan sold intoxicating liquor, contrary to the provisions of the Act of Parliament, in the house for which he was licensed?

These transactions may be shortly described as—(1) an abortive attempt to effect a statutory transfer to one Doherty, which was refused by the Justices on certain grounds, including the unsuita-

bility of the premises; (2) a series of dealings with the licensed premises by means of which Dumigan, from being a lessee for a term of years, became a yearly tenant of the licensed house, with the result that an interval of time occurred during which Dumigan was neither owner nor occupier of the house, while another person was lawfully authorized to sell intoxicating liquors there.

A publican's license does not lose its character of a personal license by reason of the circumstance that the privilege which it confers can be exercised only in respect of specified premises. At common law a personal license expires with the person of the licensee. It is incapable of assignment or transfer; while the licensed premises can be conveyed in the ordinary way, and, as we know, are frequently the subject of sale by auction. The license, though not in strictness of the nature of property, is really the thing bought and sold on these occasions, and the legislature in aid of legitimate transactions of the kind devised a means of avoiding the interruption of business which must otherwise have occurred, on the death of the licensee, or on the sale of the licensed premises, during the currency of the license. The provisions now in force are contained in the Transfer of Licenses Act of 1855, but somewhat similar provisions are contained in the 21st section of the Licensing Act of 1825. The object of this legislation was not to substitute another licensed person for the original holder of the license, but it was enacted in aid of an inchoate transaction, which, if carried out, would eventuate in such a substitution. In the case before us, Doherty was, in the language of the 1st section of the Act of 1855, a person to whom it was proposed to transfer the license granted to Dumigan. Until the intended transfer could be completed at Quarter Sessions, he obtained, under this section, a transfer by indorsement, the limited operation of which is apparent from the statute, for the privilege which it confers is to continue until the Quarter Sessions "next after the expiration of one calendar month from the date of such transfer and no longer"; and, further, the second section contains provisions which would be useless and unmeaning if the person obtaining a transfer under the former section had the *status* of a person licensed under the original Excise license. That Doherty did not become a licensed person during the continuance of the *ad interim* transfer was admitted in argument as the result

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of the decision of the Court of Appeal in *In re Deighan* (1). The person licensed was Dumigan, but he could not sell under his license so long as he was out of possession of the licensed house, and so long as a statutory power of selling under his license was vested in another man.

The English Court of Queen's Bench decided in *Andrews* v. *Denton* (2) that an Excise license remains a protection to the licensee, even during the continuance of a protection order granted to an intended transferee, as long as the licensee remains in possession of the licensed house. This decision seems to be based on the general proposition that the holder of an Excise license, unexpired and uncancelled, cannot be criminally prosecuted if at the time when he sells under the license he is in occupation of the licensed premises. And taken in conjunction with the decisions of *Price* v. *James* (3), and *In re Deighan* (1), it establishes the further proposition that an *interim* transfer or protection order does not cancel an existing license—an operation which would be inconsistent with conferring a statutory right to sell under the protection of the license upon one who is not himself the holder of it.

It is said that the right to sell under Dumigan's license was gone for ever when the Justices refused to authorize a transfer to Doherty on the ground of the unsuitability of the premises. But this decision was *res inter alios acta* as regards Dumigan, and the *res judicata* was the refusal of Doherty as transferee. In the absence of an express statutory provision, it is impossible to regard such a decision as a judgment *in rem*, or as concluding any other matter than the rejection of Doherty's application. It is to be noted that, while the personal character of the licensed person and his conduct of his business come up for review annually on the renewal of his license, there are no similar provisions for ensuring the continued suitability of the licensed premises.

As to the dealings with the licensed house, and the reduction of Dumigan's interest to a yearly tenancy, these might be of importance if the *quantum* of the estate possessed by an applicant for a license formed an essential part of his legal qualification. I do not question the right of Justices in the exercise of their

(1) 31 I. L. T. R. 45. (2) [1897] 2 Q. B. 37. (3) [1892] 2 Q. B. 428.

discretion to have regard to the nature of the interest possessed by an applicant. But there is nothing in the Licensing Code to suggest that a subsequent change in the nature of that interest operates to forfeit or cancel the license. On the 26th May, 1903, Dumigan was *de jure* and *de facto* in occupation of the licensed house, and, if I be right in holding that his license was still in force, the dealings between his mortgagees, and Doherty are, in my opinion, irrelevant, and I do not consider it necessary to consider them in detail. It was not disputed by the Solicitor-General that a licensee resuming possession of the licensed premises from an intending assignee, under an antecedent agreement to that effect, would be entitled to the benefit of his license if not otherwise cancelled or forfeited. But I cannot see how the Licensing Code is concerned with either the devolution of title to the licensed premises, or the *quantum* of interest of the licensee at any given time. I rest my judgment on the proposition that nothing has been proved in the present case which would have the effect of cancelling or forfeiting the license granted to Dumigan in October, 1902, to endure for one year, and that he was guilty of no offence in selling intoxicating liquors on the 26th of May, 1903, in the house for which he was licensed, and of which he was then in lawful occupation.

WRIGHT, J.:—

I agree in the decision announced by my Lord and my brother Madden, and in most, if not all, the reasons for that decision.

But as the case is one of first impression, and may be of general importance, and as during the course of the argument I have felt many doubts, which have only been removed on careful examination and consideration of the statutes and authorities, I have thought it right to set out and state at length the reasons for the conclusion at which I have arrived. [His Lordship, after stating the facts as above, continued:—] In the course of the argument several sections of the various Licensing Acts in Ireland have been discussed and keenly criticised, and several decisions in this country and in England have been cited, some of which throw

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light upon the question involved in the case, but none of them are exactly conclusive. It has been urged by the counsel for the prosecutor that this is a mere trick and contrivance to get rid of, and get over, the refusal of the Quarter Sessions to transfer the license to Doherty, that it is a device of Messrs. M'Connell to pass the license from one nominee of theirs to another, and on the latter not proving eligible, to transfer it back again to their first nominee, and it is argued that Dumigan having parted with his interest in the house, and gone out of possession, and having done everything, so far as he could, to divest himself of the license, cannot by resuming possession under a different title, and with a lesser term and interest, resume the trade of a publican. The effect of sect. 1 of the 18 & 19 Vict. c. 114, has been considered, if not decided, in more than one reported case.

In *In re Deighan* (1), Palles, C.B., in delivering judgment in the Court of Appeal, says:—"There is enough to show that the intention of the Act is to put the transferee, not in the position of a licensed person, but in the position of a person having authority to carry on the trade. The concluding words of the section are sufficiently indicative of this view; besides, section 2 says, in substance, that the transferee is not a licensed person, but shall be liable as if he were a licensed person." In the very short note of this case, Fitz Gibbon, L.J., would appear to base his decision on a different ground, and Barry and Walker, L.JJ., are stated to have concurred in the result, but on what grounds does not appear. In the recent case, not yet reported, of *Brown* v. *Watson* (2), Fitz Gibbon, L.J., delivering the judgment of the Court, says:—"This *interim* license, as it is called, is merely an authority to carry on the business until the Quarter Sessions next after the expiration of one calendar month from the time of transfer, and no longer. . . . No person is under any obligation to take out the temporary license which the Act of 1855 provides"; and indeed as the argument proceeded the effect of this *interim* transfer at Petty Sessions, or protection order, as Mr. Magrath preferred to call it, was not contested by the Solicitor-General, and we were informed by him that this was decided in *Deighan's Case* (1), in which he had been

(1) 31 I. L. T. R. 45. (2) Since reported, *ante*, p. 218, at p. 232.

counsel. A publican's license is a personal one, it cannot be assigned by any dealing *inter partes*, and Doherty never at any time was in the position of having it transferred to him. All that he had was authority to trade under it for the short interval between the 16th February and the 22nd April.

What was the effect of the refusal of the Quarter Sessions to grant a renewal to Doherty? The application for a transfer was opposed by the District Inspector of Police, who objected upon the two statutory grounds (under sect. 4 of the 3rd & 4th Wm. 4, c. 68) upon which a transfer can be objected to, namely, (1) the character of the applicant, and (2) the unfitness of the house. The Justices at Quarter Sessions adjudicated upon the truth, sufficiency, and validity of these objections, and on both grounds of objection, being satisfied of their truth and sufficiency, refused to grant a transfer. This decision is an adjudication, but only upon the application of Bernard Doherty for a transfer. It would be impossible to attribute to it any further or greater effect, or to hold that the finding that the premises were unsuitable was, as was argued by counsel for the prosecutor, in the nature of a judgment *in rem*. It did not kill or extinguish the license. If, then, a publican's license, capable of being transferred by a competent tribunal, was in existence up to the 22nd April, 1903, and was not, as I hold it was not, extinguished by the refusal of the Justices at Quarter Sessions to grant an *interim* transfer on that date, is Dumigan, to whom it was originally granted, on getting back into possession, entitled to sell as a publican under it?

The right to the benefit of a publican's license cannot exist apart from the ownership and possession of the licensed premises (*per* Chatterton, V.-C., in *Brennan* v. *Dorney* (1)). "The essential condition to the grant of a license" (*per* Fitz Gibbon, L.J., in *Cox's Case* (2)) is "that the person to be licensed should be *de facto* and *de jure*, upon receiving his license, entitled to the possession of the premises, and ready to carry on the business there, then, and thenceforward."

It is clear that Dumigan fulfilled this condition when the license was originally granted to him, and continued to do so

(1) 21 L. R. Ir. 353, at p. 361. (2) 16 L. R. Ir. 424, at p. 438.

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down to the date when the last renewal was issued in October, 1902, and thence on to February, 1903. It is also clear that in May, 1903, he got back into rightful possession of the house, in respect of which the license, a personal privilege to him, had been granted to carry on the trade of a publican in that very house for a period of twelve months then unexpired. Has the parting with and going out of possession of the house for two or three months during that period disentitled him to resume the business of a publican in that house for the rest of the period absolutely, notwithstanding that he has succeeded in uniting in himself possession, and rightful possession, of the house (though for a lesser term), and right to the license? This question is a new one, uncovered by authority. We have, however, been referred to some cases which may aid us in deciding it. The language of Fitz Gibbon, L.J., in *O'Brien* v. *The Justices of Tipperary* (1), at p. 136, is relied on :—"Where a licensed person holds licensed premises, with his concurrence or on devolution of title from him in certain specified ways, but not otherwise, the license may pass with the premises by way of transfer; but where the connection between the person and the premises is determined, and the common title to both license and premises is interrupted, I think the right to renewal or transfer is lost, and those claiming either on personal grounds, as representing the holder of the former license, or as owners of the premises, must submit their claims to the Justices merely as applicants for new licenses." This language must be understood with reference to the state of facts in that case. There the house had been evicted by the landlord, but the license granted to the tenant had not only not been assigned to the landlord, but the tenant had made use of it to obtain a renewed license for himself of other premises in the neighbourhood: it was held that the landlord recovering back possession of the premises after the expiration of the lease was not an assignee of the tenant. There the possession of the premises and the right to the license ceased to be united in the one person, and such severance had continued. In *Andrews* v. *Denton* (2), also relied on, a publican had by indorsement transferred his

(1) 6 L. R. Ir. 129. (2) [1897] 2 Q. B. 37.

license to a man named Jocelyn, who, under the English Act, 5 & 6 Vict. c. 44, section 1, a section corresponding to, though not identical in terms with, the Irish Act, 18 & 19 Vict. c. 114, s. 1, obtained from the Justices at Petty Sessions an order, usually called, as the report of the case states, a protection order, but had remained in possession, and traded as a publican after the making of the protection order, and down to the date of the alleged offence. The Court held that he could not be convicted under section 3 of the Licensing Act of 1872 for selling liquors, not being a person duly licensed. Hawkins, J., says:—"Denton had the license: he continued in occupation of the premises, and carried on the business down to a time covering the period during which the illegality is said to have been committed by him, and I see no ground whatever for holding that his license was cancelled or terminated," and Wright, J., concurred. I cannot see that this case is an authority against the respondent here.

In *Lawrence* v. *O'Hara* (1) a summons under the same section was dismissed, the Court holding on the facts that the publican had never abandoned his license, although he had left the premises and gone out, and remained out, of possession for a considerable period of the twelve months covered by the license, and that there was nothing to prevent a man, who had abandoned a license for a time, from coming back and carrying on the business again on the premises during the residue of the term of the license. An expression of Lord Alverstone was relied on, "no fresh interest having intervened," which surely must mean a fresh interest created and continuing so as to prevent the person licensed from carrying on trade in the licensed premises. On the facts of the present case, it is, in my opinion, impossible to hold that Dumigan was bound to apply (under section 2 of the 3 & 4 Wm. 4, c. 68) either for a new license or, as it was alternatively put by counsel for the prosecutor, for a transfer to himself of his own license. If he succeeded, as he has done, in getting back the possession of the house in which only the business could be carried on, then, in my opinion, he has succeeded in again uniting in himself, during the period covered by the license, the two conditions

(1) 47 Sol. Jour. 639.

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(possession of the house and the license) essential to enable him to trade as a publican.

I am therefore of opinion that the decision of the majority of the magistrates in convicting Dumigan was erroneous, and that the summons ought to be dismissed.

Solicitors for the appellant: *Shean & Dickson.*
Solicitor for the respondent: *Sir P. Coll.*

J. G. T.

SULLIVAN *v.* CREED (1).

(1903. No. 980.)

K. B. Div.
1903.
April 21, 22.
May 18.
Appeal.
Nov. 5, 6, 20.

Negligence—Dangerous article—Loaded gun left by defendant on his own land—Intervening act of third party—Proximate cause of injury.

Defendant left a gun loaded and at full cock standing inside a fence on his lands, beside a gap from which a private path led over defendant's lands from the public road to his house. The defendant's son, aged between fifteen and sixteen, coming from the road through the gap on his way home, found the gun. He went back with it to the public road, and not knowing that it was loaded, pointed it, in play, at the plaintiff, who was on the road. The gun went off, and the plaintiff was injured:—

Held, by the King's Bench Division (Palles, C.B., and Gibson, J.; Boyd, J., *diss.*) and by the Court of Appeal, that the defendant was liable in respect of the injury.

THIS was an application on behalf of the plaintiff to set aside a verdict and judgment entered for the defendant, and to enter judgment for the plaintiff for £50 damages, or for a new trial.

The action was brought by the plaintiff, a boy of sixteen years of age, by his next friend, for the recovery of damages against the defendant for negligence.

The action was tried before Kenny, J., and a common jury of the city of Cork, at the Spring Assizes, 1903, when the following facts were proved:—On the 10th August, 1902, the plaintiff was returning home from Mass by a public road which passed the defendant's lands. On his way he met Daniel Creed, a son of the defendant, aged between fifteen and sixteen, and two other boys. Daniel Creed left them at a gap leading to the defendant's house. This gap consisted of two pieces of deal, with a narrow passage between, level with the road, and from the gap a private path led to defendant's house, forming a short cut to it. The plaintiff and the two other boys continued along the high road, and had gone

(1) In the King's Bench Division, before PALLES, C.B., and GIBSON and BOYD, JJ.

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about 25 yards when the plaintiff heard Daniel Creed, who had come back to the high road, cry "Hi, lads." The plaintiff looked round, and saw a gun in Daniel Creed's hands pointed towards him. The gun went off, and the plaintiff was hit in the eye, and in consequence lost the eye. The plaintiff stated in his evidence that he heard the defendant say that in the morning he went out to shoot rabbits, but got none, and that he met a couple of neighbours and walked along the road with them, and then went to a cottage and read a paper, and before going left his gun. The plaintiff's mother stated she heard the defendant say that he went and took his gun; that he loaded it, and that it was near the road; that he put the gun inside the stile out of his hand, and that it was on full cock; that he went along with two men to show them a field of "spuds," and then went to a cottage and remained there reading newspapers till the people were coming back from Mass, and that after coming out he heard the shot of a gun. Daniel Creed, the defendant's son, was called as a witness for the plaintiff, and stated: "I saw the gun. It was up against the ditch near the gap. I saw it the moment I went in through the gap. I was fiddling with the gun; I did not know it was loaded; I was playing with it."

The defendant called no evidence, and asked for a direction on the following grounds:—1. That the injuries arose from the wilful act of a third party of upwards of fourteen years of age, and that there was no legal liability on the defendant for the act of such a party. 2. That there was no legal duty on the part of the defendant towards the general public to guard against the boy obtaining possession of the gun. 3. That the injuries were not the reasonable and natural result of any failure of duty by the defendant.

It was admitted on both sides at the trial that the question was one of law, and that it was desirable to take the opinion of the jury on the question of damages. The only question left to the jury was, to what damages was the plaintiff entitled, assuming that he was entitled in point of law to succeed. They found £50, and then by direction of Kenny, J., the jury found a verdict for the defendant, and the learned Judge gave judgment for the defendant. It was agreed that the Court should be at liberty to draw

all proper inferences of fact, and that if the verdict was changed the damages were to be £50.

Redmond Barry, K.C., and *Carrigan*, for the plaintiff.

Matthew J. Bourke, K.C., and *A. M. Sullivan*, for the defendant.

[The arguments of counsel proceeded on similar lines to those in the Court of Appeal, which will be found fully reported, *infra*, p. 335.]

BOYD, J. :—

May 18.

The facts in this case are not in dispute, and are few and simple, but they raise a novel and important question of law.

It appears from the evidence that on Sunday, 10th of August last, the defendant, who is a small farmer in the county of Cork, took out his gun for the purpose of shooting rabbits, and having charged it, he went out with it and put it on full cock. He found no rabbits and did not discharge the gun. He left the gun, loaded and cocked, standing against a fence on his lands, and beside a stile through the fence, which stile admits to a private and short pass to his house from the public road. Two men had come to him, and he went with them, as he states, "to show them a field of 'spuds,' and then went to a cottage and remained there reading newspapers till the people were coming back from Mass, and that after coming out he heard the shot of a gun." It further appears from the evidence in the case that Denis Sullivan had been at Mass, and that his way home led past the defendant's, and on the way he met Dan Creed (a son of the defendant, aged between fifteen and sixteen years) and two other young lads, and walked along the road with them. Dan Creed left them at the stile or gap leading to his own house. On going through the gap he saw the gun, which was up against the ditch near the gap. He took it up and was fiddling with it, not knowing that it was loaded, and was playing with it. He went out through the gap with it on to the high road and shouted, "Hi, lads," to the other boys, who had then walked to a distance of about twenty-five yards. The gun went off, and young Sullivan was hit in the left eye, and has, as a consequence, lost the eye. It is not stated in the evidence

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what caused the gun to go off: whether Creed pulled the trigger or aimed at the other boys, or whether it went off by some accident when he was, as he says, "playing with it." The evidence is, on the whole, very meagre and indefinite. At the close of the evidence for the plaintiff, Mr. Sullivan (counsel for the defendant) called no witness, and asked for a direction on three grounds mentioned in the report of the learned Judge who tried the case, and who directed a verdict for the defendant.

In my opinion there are two points in the case—(1) was the defendant guilty of negligence in leaving the loaded and cocked gun where he did leave it, and (2) assuming that he was guilty of negligence in so leaving the gun there, was the act of the defendant the ordinary or proximate cause of the damage to the plaintiff, or within the probable consequences which the defendant may be presumed to have contemplated, or for which he is responsible?

As to the first point, I am not satisfied that the defendant was guilty of actionable negligence in leaving his gun where he did. It was left by him on his own lands and not exposed to public view, and where he could not reasonably expect that it would be interfered with by anyone. The stile near to which it was left admited to a private pass to his own house, and no person had a right to use it except members of his own household. How many persons his household consisted of does not appear, and the only one mentioned in the evidence is his own son, through whose default the unfortunate accident happened. Where his son was on the morning in question does not appear except at the time of the occurrence. Could it be contended that if the defendant had left the gun loaded and cocked in his own room in the house he would be guilty of negligence? The gun, if not interfered with, could do no injury to anyone. Suppose he had locked it up in a press, he clearly would not have been negligent, even had he left the key in the lock. The mere fact that the gun was so left would not, I think, constitute actionable negligence. Had he sent some person to fetch it to him, and omitted to inform the person that it was loaded and cocked, or had he sent a young, inexperienced child for it, I think he would be responsible, though he should have cautioned the child.

The decision in the case of *Dixon* v. *Bell* (1) is based upon the fact that a young and inexperienced child was negligently entrusted with a loaded gun, and not on the fact that the gun was allowed to remain loaded. Where any dangerous article is entrusted by any person, a duty is created towards the person so entrusted with it, and towards others who may be injured through that person's negligence or inexperience, if experience and knowledge should be reasonably necessary.

In the case of *Cox* v. *Burbidge* (2) the action was brought against the defendant to recover damages for injuries sustained by a kick from a horse of the defendant, which had strayed from his lands on to the public road, and there inflicted the injuries upon the child, the plaintiff in the action. Erle, C.J., in his judgment states:—"To entitle the plaintiff to maintain the action, it is necessary to show a breach of some legal duty due from the defendant to the plaintiff"—"there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff"; and again, "even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains."

As to the second point, Mr Sullivan contends that even though the defendant was guilty of negligence, it does not follow that he can be held responsible for injuries that have resulted, not from the direct consequence of such negligence, but from circumstances which he could not or should not reasonably anticipate, and which, in all human probability, would not have happened. The place in which he left the gun was inside the fence on his own lands, near a stile through which the public had no right of passage, and which should only be used by persons going to his own house. It does not appear what number of persons had a right to pass through the stile or go upon his lands, and, so far as appears from the evidence, he and his son were the only persons who had any right to do so. The son is between fifteen and sixteen years of age, and even had he considered that his son might pass through the stile and see the gun, I do not think that he could reasonably imagine or believe that a boy of that age would interfere with it. The boy

(1) 5 M. & S. 198. (2) 13 C. B. (N. S.) 430.

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was not a mere child, and might be thought to have arrived at an age when he would be unlikely to "play with" it. What reason had the defendant to anticipate that even his son would have gone by that way on that day? The pass was a short way to the house, but it was not the only way. Had he left the gun loaded as it was in his house, and his son had, unauthorized by him, taken it out of the house and gone down to the road with it, and by his (the son's) negligence caused the injuries complained of, could the defendant be held liable for the consequences resulting from such unauthorized and unlikely act? The leading case upon the point is *Dixon* v. *Bell* (1), but in that case, as I have already stated, the decision proceeded on the ground that the owner of the gun "entrusted" the gun, knowing it to be loaded, to his young servant girl to carry it to him, and that, therefore, he was liable for his careless conduct on the occasion.

In the case of *Clark* v. *Chambers* (2) most of the cases bearing on the point are reviewed. In that case the defendant had wrongfully placed a barrier across a public way with a dangerous construction on the top of it. This dangerous obstruction was lawfully removed, but was left on the public highway by the person who removed it, and a passenger on the highway struck against it and was injured. It was held that the defendant was responsible, because he had been guilty of an unlawful act, and a violation of his duty to the public. Almost all the cases referred to in that case were cases in which the parties had left dangerous machines, vehicles, or obstructions on public thoroughfares, and such parties were held liable for injuries resulting to persons lawfully using the thoroughfares, though the acts of third parties were the direct cause of the injuries. The principles of the law applicable to such cases are clearly stated by all the Judges, and the grounds on which they based their judgments are stated. Lord Denman, C.J., in *Lynch* v. *Nurdin* (3), states:—"For if I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have

(1) 5 M. & S. 198. (2) 3 Q. B. D. 327. (3) 1 Q. B. 29, at p. 35.

redress by action against both or either of the two, but unquestionably against the first." And then, by way of illustration, the Chief Justice puts the case of a gamekeeper leaving a loaded gun against the wall of a play-ground where boys were at play, and one of the boys in play letting it off. Lord Denman says that the gamekeeper must answer in damages to the wounded party. The illustration put by Lord Denman has no bearing on the facts in the present case, as the gamekeeper knew the school boys were there, and should reasonably have anticipated that they might play with the gun.

In *Collins* v. *Middle Level Commissioners* (1), Mr. Justice Montague Smith says:—"The defendants cannot excuse themselves from the natural consequences of their negligence by reason of the act" of third parties.

Chief Justice Cockburn, in his judgment in *Clark* v. *Chambers* (2), states:—"It must, however, be admitted that in one or two recent cases the Courts have shown a disposition to confine the liability arising from unlawful acts, negligence, or omissions of duty within narrower limits, by holding a defendant liable for those consequences only which, in the ordinary course of things, were likely to arise, and which might, therefore, reasonably be expected to arise, or which it was contemplated by the parties might arise, from such acts, negligence, or omissions." He also refers with approval to the judgments of Pollock, C.B., in *Greenland* v. *Chaplin* (3), and of Bovill, C.J., Grove, J., and Keating, J., in *Sharp* v. *Powell* (4), in which latter case Bovill, C.J., says:—"No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom, but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene, so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does

(1) L. R. 4 C. P. 279, at p. 287.
(2) 3 Q. B. D. 327, at p. 336.
(3) 5 Ex. 243.
(4) L. R. 7 C. P. 253.

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result to a third person, it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action." In most of these cases the acts committed by the wrongdoers were wrongful acts committed in places which the public had a right to use and frequent, and there was a duty on the part of the wrongdoer towards the public not to expose them to risk and damage by his wrongful act. In the present case no such duty existed, and, in my opinion, to hold the defendant liable would be to extend the liability, instead of confining it, which Cockburn, C.J., states, in *Clark* v. *Chambers* (1), the Courts have shown a disposition to do.

How could the defendant be held to have reasonably expected that the consequences which did arise were, "in the ordinary course of things, likely to arise, and which might, therefore, reasonably be expected to arise," to use the words of Cockburn, C.J.; or be liable "in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated" (Pollock, C.B., in *Greenland* v. *Chaplin* (2)); or "could reasonably have expected to follow from it" (Bovill, C.J., in *Sharp* v. *Powell* (3))? In this last-mentioned case the Chief Justice states the law to be as follows:—"No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom, but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act."

There is no evidence in this case that the defendant should reasonably have contemplated that his son would return home by the way he did, or even if he might have so contemplated that he should have reasonably thought that a boy of his age would do what he did when he found the gun.

The case of *Engelhart* v. *Farrant & Co.* (4) has been referred to, but I do not think it has much, if any, bearing on the question for decision in this case.

I am of opinion the decision of Mr. Justice Kenny is correct, and that the defendant is entitled to hold the verdict which was directed for him.

(1) 3 Q. B. D. at p. 336.
(2) 5 Exch. at p. 248.
(3) L. R. 7 C. P. 253.
(4) [1896] 1 Q. B. 240.

GIBSON, J. :—

Our decision depends on the answer to the question, was the misfortune the direct consequence of a danger which a prudent man ought to have perceived? It is immaterial that the specific mischief was not actually foreseen. The possessor of a dangerous article is bound to exercise diligence for the protection of those likely to be injured by a probable use of such article. Thus, there is actionable liability where the vendor of a dangerous commodity, without warning, sells it to a purchaser presumably unaware of such danger: *Clarke* v. *Army and Navy Co-operative Society, Limited* (1); where a master entrusts to a young and unfit messenger a gun negligently left loaded which it was his duty to have made safe: *Dixon* v. *Bell* (2) (the short and unsatisfactory report of which case must be read in connection with the reports of the trial and charge of the Chief Justice in 1 Starkie, 287, and Holt, 233); where a railway company omits to guard against the known risk arising from boys being in the habit of trespassing on a particular part of their line: *M'Dowall* v. *Great Western Railway* (3); where a schoolmaster, being in the position of father towards his boys, leaves an explosive in a conservatory to which his pupils have access: *Williams' Case* (4); where a person leaves a dangerous thing in a place where he ought to know it is likely to be set in motion, or used (even without authority) to the injury of anyone: *Lynch* v. *Nurdin* (5); *Clark* v. *Chambers* (6).

The principle of these cases is clear, but "the tendency of a given act to cause harm under given circumstances must be determined by experience" (Holmes on the Common Law, pp. 147, 162). As to the circumstances necessary to be known to make a man liable for the consequences of his act, "they must be such as would have led a prudent man to perceive danger, though not necessarily to see the specific harm": Holmes, *supra*, p. 147.

The question of liability depends on the particular circumstances, including the nature of the dangerous article, the place, the persons likely to be brought in contact with it, and the time.

A hatchet, a bottle of poison labelled "poison," the same

(1) [1903] 1 K. B. 155.
(2) 5 M. & S. 198.
(3) [1902] 1 K. B. 618.
(4) 10 *Times* L. R. 41.
(5) 1 Q. B. D. at p. 35.
(6) 3 Q. B. D. at p. 339.

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bottle unlabelled, a loaded gun, gunpowder, or dynamite, all represent articles of varying degrees of danger, and the greater the danger the higher is the standard of the diligence which the law exacts. Where the article is known, according to common experience, to exercise an allurement, temptation, or fascination even—particularly over young persons—to meddle with it, the utmost care ought to be taken. Firearms and fireworks would come within this category. So as to place: a loaded gun left on a highway or school playground, or in the hall of a house open to young children, would be dangerous in a way that the same weapon would not be if it was forgotten on a mountain, or was left in a shooting lodge tenanted by sportsmen.

The same considerations apply to the persons likely to be thrown in the way of the dangerous article, and also to the time when the occurrence takes place. Young persons are more likely to be imprudent than those of mature years; and it would be more dangerous to leave perilous articles about in the daytime than at night.

The question before us is whether, under the circumstances proved in the case, having regard to place, time, and persons likely to see the weapon, a prudent person ought to have foreseen danger to others from the gun being left where it was, exposed on full cock. The evidence is unfortunately meagre, as plaintiff's counsel appear to have treated the question as one of pure law rather than as a question of fact depending on circumstances. The nature of the farm, the locality, distances, the inmates of the defendant's home, of whom I assume the boy was one, and their ages, the exact character and user of the path, the son's movements that day, the character of the weapon, whether muzzle-loader or otherwise, and other matters of fact, are not explained. The defendant himself was not examined.

With much of the argument of defendant's counsel I am quite unable to agree; such as that the gun being deposited on private property, the defendant was under no duty to those who might be injured by it on the high road; or that the son's going back to the road after he took up the gun could not have been in any reasonable man's contemplation. The defendant owed a duty to every one likely to be injured by a negligent use of the weapon, if a

prudent person ought to have foreseen some such use; and the danger to be guarded against cannot be confused with the specific form of the negligent handling of the firearm. The master in *Dixon* v. *Bell* (1) never thought for a moment that the girl, after laying aside the gun (which she had been led to believe was safe), would have unexpectedly taken it up again and pointed it at the child. The argument that the handling and use of the gun were trespassory and unauthorized is also inadmissible, as the cases demonstrate.

The circumstances of alleged negligence directly causing the misfortune are these: the gun was left at full cock, beside and in the view of a footpath where it could be seen by anyone using the path. It was in an inviting position to any person, particularly a young person, who noticed it; the day and hour would tend to convey that the gun was unloaded. Defendant's son, of fifteen years of age, took it up in that mistaken belief, and tricking with it caused the injury. The boy was not of tender years, but his age was such (as the decisions on the Employers' Liability Acts show, *e.g. Crocker* v. *Banks* (2)) as to make it desirable not to place dangerous articles, such as loaded firearms, in his way, without caution or warning. Boys of fifteen are just as mischievous and likely to play with guns as children of ten or twelve. In *Williams' Case* (3), Lord Esher, after assimilating the duty of a schoolmaster to that of a father, observes:—"He was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way." The same remark applies, according to my experience, to young persons no longer *in statu pupillari*, at least in the case of firearms. If the defendant had left this gun, as it was, on the high road, or entrusted it to his son without warning, he would have been, I have no doubt, responsible. I think also if he knew that his son would come home by the path at that hour, and left it alluringly in his way, on full cock, he might also have been made answerable for actionable negligence.

In one point of view, no doubt, the occurrence was an accident. It would not have happened if the plaintiff had not been on the road in company with young Creed, or if the boy had gone home

(1) 5 M. & S. 198. (2) 4 *Times* L. R. 324. (3) 10 *Times* L. R. 41.

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another way, or had not seen the gun, or had not been seized with the sudden desire to play with it; or if the defendant had discharged the gun at a rabbit, or if he had not forgotten all about the gun in the distraction of showing the field of potatoes to his neighbours, or if he had not taken up his newspaper to read. The question, however, is whether the circumstances were such as ought to have brought to the mind of a prudent person the knowledge that the gun was left in a dangerous place and condition where it might be meddled with by some one like his son, in ignorance that the gun was loaded. There is no question as to the principle. The difficulty is caused by the looseness and want of particularity of the evidence. My opinion has fluctuated as to whether the circumstances were such as to justify the inference that young Creed's negligent use of the gun was such a danger as defendant, who did not foresee it, ought to have foreseen, so as to connect the injury as a direct and natural consequence with defendant's negligence. The case is near the border line. With some doubt, I think that the evidence justifies the inference of direct causal relation. If so, it would appear that the understanding at the trial was that the verdict should be entered for the plaintiff. The defendant was not called to extenuate or repel any adverse inference, and his conduct is left without any attempted explanation why he could not have apprehended danger.

PALLES, C.B. :—

The liability of the defendant here, if liable he be, is undoubtedly not far from the border line. The matter in doubt is not so much any principle of law as the application of an admitted principle to the circumstances in proof.

I take it as certain that if the defendant, when he left the gun at the place at which it was found by his son, ought to have foreseen that some person might reasonably be expected to pass that way, take possession of the gun, and use it without due care, he would be liable. I say "*might*," because it is not necessary that he ought to have foreseen that these things *must* have occurred: one is responsible not only for the necessary, but for the reasonably probable consequences of his acts.

Now, ought the defendant to have so foreseen? In other

words, would a reasonable man, placed in the circumstances in which he was, and giving such consideration to the question whether he should leave his gun in the place in which he did leave it, have so foreseen? As a general rule, such a question is one of fact, and ought to be submitted to the jury.

It was admitted at the trial that the matter involved was one of law only; and the only question of law that can arise is, whether there is evidence upon which it ought to have been submitted to a jury. I proceed to consider this question.

There is no doubt, in my mind, that the defendant was negligent in leaving the gun where he did. It was argued that although it might popularly be said that he was so, in law he was not negligent, because it is said that he did not, at the moment when the act was done, violate any duty to the plaintiff, or, indeed, to anyone. I do not agree in this. I hold that anyone who is in possession of a dangerous instrument owes a duty to the public, or at least to such members of the public as are reasonably likely to be injured by its misuse, to keep it with reasonable care, so that it shall not be misused to the injury of others.

I start, then, with this, that there is evidence that the defendant was negligent, and that his negligence was the *causa sine quâ non* of the plaintiff's injuries. The real question is, was that negligence no more than a *causa sine quâ non*; was it a *causa causans*, the immediate and proximate cause? Was the relation between the negligence and the injuries that of cause and effect, or was the chain of causation broken by the intervening act of the son?

Now, the disposition of the boy was, presumably, within the knowledge of the defendant, and not of the plaintiff. Of that disposition, as the defendant was not examined, we know nothing, save what may be gathered from his action on this one occasion, and our own knowledge of the dispositions of ordinary boys of his age; but it certainly was within the province of a jury to hold that to the knowledge of his father he was not exceptionally careful.

Again, we have no evidence of the arrangements of the family as to the time at which its various members went to Mass on Sundays—matters also within the knowledge of the defendant, and not of the plaintiff.

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From this, and the evidence that the boy was with others who were coming from Mass, I hold that a jury might conclude that the defendant might have foreseen that the boy *might* pass from the road to the house by the private way or short cut, and would, therefore, have an opportunity of seeing, and if so disposed, of taking, the loaded gun.

Lastly, I cannot think that it was beyond the province of a jury to hold that he might have foreseen that the taking of the gun by the boy would not have been an improbable result of his seeing it, in a place where there was not a parent or a person in authority to prevent him. I am, therefore, of opinion that a jury might well have found that the defendant ought, under the circumstances, to have foreseen that the boy *might* take possession of the gun. But even this is not necessary, for, in my opinion, the liability of the defendant would be the same if he ought to have foreseen that *any* boy, as distinguished from this particular boy, might have seen and handled the gun; and having regard to the place in which it was placed, I think it would have been wholly impossible to have withdrawn from the jury the question whether he ought to have so foreseen.

This alone, however, would not be enough. Ought he then to have foreseen that the boy *might*—I do not say *would*, but that he *might*—use the gun negligently? This appears to me to be the ultimate and crucial question in the case. No doubt the answer must be based upon the common experience of mankind as to what, under the circumstances, would be the action of that person of whom we so often speak, but who, to my mind, has no existence, save as an *ens rationis*—"the reasonable man." However, no one individual can determine what would be done by this hypothetical creature under any given state of circumstances, otherwise than by his own experience, and as the experience of one man usually differs from that of another, our law wisely says that what is "reasonable" is to be determined by the jury—that is, it is to be the resultant of the, to a certain extent varying, opinions of twelve different persons. But then the law, within the last century, laid down that before a Judge can submit to a jury the question what a reasonable man would do under a certain given state of circumstances, he himself should determine that the

circumstances were such that they might reasonably arrive at a conclusion favourable to the party upon whom the onus lay. This is a question of law, and one that the Judge must determine from his own individual experience of life.

I have no hesitation in saying that I would much prefer the opinion of a jury upon the subject to my own; but my opinion is that the defendant ought to have foreseen it. My reasons for arriving at this conclusion are the following:—

The possession of a loaded gun imposes upon the person who is in possession of it an obligation to use a much greater amount of care than would the possession of the same gun were it unloaded. Where there is any danger to human life, as there nearly always is in the unguarded use of loaded weapons, it is impossible to exaggerate the amount of care thus imposed. Further, I am of opinion that a prudent person recognizes the necessity of this care, and regulates his conduct accordingly.

Now, the amount of care usually exercised by a person depends, not upon the existing material circumstances, but upon such only of those circumstances as are actually present to his mind. In my opinion, a person who, knowing a gun to be loaded, gives it into the possession of another without telling him that it is loaded, is guilty of a want of due care, because, although a prudent person ought to treat a weapon which he does not know to be unloaded as if it were in fact loaded, it appears to me impossible to say that the actual knowledge that it is loaded might not have, and indeed usually has, an effect upon his conduct different from that which the absence of that knowledge whether it was or was not loaded would have had. We must take mankind as we meet them. One has no right so to regulate his conduct that injury may result from it to others, unless others act with an *unusual* amount of caution.

The defendant here was not entitled to act upon the assumption that whoever came into the possession of the gun would act with the highest degree of care. Had the defendant given his son the loaded gun, without informing him that it was loaded, and without bringing to his mind the circumstance which might impress him with the obligation of using the *maximum* of care, I would have held that the defendant ought to have foreseen that the boy might probably use it without that great amount of

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care which the fact of which he was ignorant imposed upon him. But if he ought reasonably to have foreseen that the boy might take the gun, without knowing it to be loaded, his liability for placing it in such a position as rendered such a result reasonably probable would, in my opinion, be identically the same as it would have been had he voluntarily given it into his possession without informing him that it was loaded.

So much for the facts of this particular case. Now a few words as to the authorities.

In *Dixon* v. *Bell* (1), the defendant kept in the house of one Leman, where he lodged, a loaded gun. When he left the house, he sent a mulatto girl, his servant, aged about thirteen or fourteen, for the gun, desiring Leman to give it to her, and to take the priming out. Leman did so, so told the girl, and delivered the gun to her. She, after a time, presented it, in play, at the plaintiff's son, a child of between eight and nine, saying she would shoot him, and drew the trigger. The gun went off, and destroyed one of the son's eyes. Lord Ellenborough, C.J., in charging the jury, asked them to consider two things: first, was such a degree of caution used by the defendant as to render the instrument safe in any hands? and secondly, if not, they were to consider whether the defendant was not guilty of negligence in trusting it to a servant of such an age, who, under all the circumstances, was likely to make such a use of it as a person of greater discretion would not have made. If upon the whole they were of opinion that the instrument in such a state ought not to have been entrusted to such a person, the plaintiff would be entitled to their verdict. A verdict having been had for the plaintiff, Lord Ellenborough, in refusing a rule for a new trial, said:—"The defendant might and ought to have gone farther; it was incumbent on him, who by charging the gun had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents; and though it was the defendant's intention to prevent all mischief, and he expected this would be effectuated by taking out the priming, the event has unfortunately proved that the order to Leman was not sufficient; consequently, as by this want of care the instrument was left in a

(1) 5 M. & S. 198; 1 Stark. 287.

state capable of doing mischief, the law will hold the defendant responsible." Bayley, J., says :—"The gun ought to have been so left as to be out of all reach of doing harm. The mere removal of the priming left the chance of some grains of powder escaping through the touch-hole."

Upon the assumption that the defendant is under the same liability as if he had handed the gun to the boy, that case would be much stronger than the present, as the defendant here took no precautions whatsoever, and the question whether there was evidence that the injury was the reasonable consequence of the negligence, the sole matter relied on here, was in that case treated as too clear for argument. It was not even raised on the new trial motion.

This case has ever since been treated as a leading one; it is discussed in every book on Torts; has been cited in innumerable arguments. It has never been overruled, nor, as far as I am aware, ever judicially questioned.

In the well-known case of *Lynch* v. *Nurdin* (1), Lord Denman, C.J., laid down the law thus:—"If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." And he puts the following illustration:—"If, for example, a gamekeeper, returning to his duty from his daily exercise, should lay his loaded gun against the wall in the playground of schoolboys, whom he knew to be in the habit of pointing toys in the shape of guns at one another, and one of them should playfully fire it off at a school-fellow and maim him, I should think it would not be doubted that the gamekeeper must answer in damages to the wounded party."

The example thus put by Lord Denman is, no doubt, an extremely strong one; but the legal liability depends, not upon the act being "extremely" probable, but *reasonably* probable: and if I am right in holding that the defendant ought to have foreseen that the boy, or some other boy, might take the gun, and use it

(1) 1 Q. B. D. 35.

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incautiously, this decision would be a direct authority in favour of the plaintiff.

Reliance has been placed upon the judgment, in *Mangan* v. *Atterson* (1), of Martin, B., who held that the act of the boy, in turning the handle of the machine, severed the connection between the negligence of the defendant and the injury complained of. But that opinion was not the *ratio decidendi* of the Court; the judgment of Bramwell, B., was grounded upon the absence of negligence in the defendant, and neither Pollock, C.B., nor Pigott, B., expressed the grounds of his opinion. Further, this case is expressly disapproved of in *Clark* v. *Chambers* (2).

In *Williams* v. *Eady* (3) Lord Esher uses words very applicable to the present case: "He was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way."

The propensities and habits of children are not matters of law to be determined by Judges without regard to anything but their age. Those habits are matter for the consideration of juries. Some children have as much prudence and discretion at ten or twelve years old as others have at eighteen. The boy in the present case was between fifteen and sixteen.

There is another case (*Crocker* v. *Banks* (4)), in which a girl of seventeen, who was employed in filling sodawater bottles, omitted to wear a mask, which she ought to have worn, during the absence of which she was injured by the explosion of a bottle. This omission was held not to disentitle her from recovering damages.

Upon the whole, my opinion is that the question was for the jury. I think the agreement at the trial was that if the Judge was wrong in directing the verdict for the defendant, it should be entered for the plaintiff; and even were it necessary that I should myself draw the inference of fact, I would have no difficulty in holding that the injuries were attributable to the defendant's negligence.

I am therefore of opinion that the verdict should be entered for the plaintiff for the £50 damages assessed at the trial, and that judgment should be entered thereon, with costs. J. G. T.

(1) 4 H. & C. 388.
(2) 3 Q. B. D. at p. 339.
(3) 10 *Times* L. R. 41.
(4) 4 *Times* L. R. 324.

The defendant appealed to the Court of Appeal (FITZ GIBBON, WALKER, and HOLMES, L.JJ.)

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M. Bourke, K.C., and *A. M. Sullivan*, for the appellant :—

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The direct cause of this injury was not the carelessness of the defendant, but the wilful and reckless act of a third party. That third party was over fifteen years old, and was therefore criminally as well as civilly responsible for his misconduct. His taking the gun from within the fence, and going back to the road with it, and there taking aim and firing at persons 25 yards off, was his deliberate and independent act. Such a case is not within the rule which makes persons liable for the consequences of their negligence, even though these consequences are only realized through the intervention of a third party. That rule only applies where such intervention is an ordinary incident naturally to be expected in the situation. For instance, persons bringing carts, dangerous machines or instruments, on public streets, must guard against interference by the young, the thoughtless, the idle, and the mischievous, who frequent such places. Leaving a cart unattended, or a machine unguarded, in such a place, is a temptation to such people to meddle; and any person negligently offering such temptation is liable for the consequences. This is the principle illustrated by *Illidge* v. *Goodwin* (1); *Lynch* v. *Nurdin* (2); *Engelhart* v. *Farrant* (3); *Clark* v. *Chambers* (4). That rule has no application where the third party's interference which causes the mischief is not an act which takes place in the ordinary course of affairs, or which the defendant might, and reasonably ought, to have anticipated: *Murphy* v. *Great Northern Railway Co.* (5); *M'Dowall* v. *Great Western Railway Co.* (6).

The true principle is that a person charged with negligence is liable for those consequences only which in the ordinary course of things are likely to arise, and which may therefore be reasonably expected to arise from the acts or omissions he is guilty of: *Sharp* v. *Powel* (7); *Greenland* v. *Chaplin* (8). If it is sought to make the

(1) 5 Car. & P. 190.
(2) 1 Q. B. 29.
(3) [1897] 1 Q. B. 240.
(4) 3 Q. B. D. 327.
(5) [1897] 2 I. R. 301, 313.
(6) [1903] 1 K. B. 331.
(7) L. R. 7 C. P. 253.
(8) 5 Ex. 243.

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defendant liable for injury caused by the mischievous intervention of a third party, some facts or circumstances which made that intervention probable must be shown to have been within his knowledge: *Sharp* v. *Powell* (1). Here there is no evidence of such matters.

Special situations and circumstances may fix a person with the duty of anticipating and guarding against intermeddling by third parties. Instances of this are the case put by Lord Denman, C.J., in *Lynch* v. *Nurdin* (2), of a gamekeeper leaving a loaded gun against the wall of a play-ground where schoolboys are at play; also the case of *Williams* v. *Eady* (3), where a schoolmaster left dangerous matter (a stick of phosphorus) in a public school, where the boys had access to it, and one boy meddling with it injured another. These special circumstances imposed the duty of foreseeing, and taking precautions against, the natural and probable danger.

In the present case not a single fact or circumstance is proved to show that the defendant ought to have known that his son would be likely to find the gun, and go back to the public road with it, and there see young companions of his, on their way home, and fire after them. That such things would happen was most improbable. *Dixon* v. *Bell* (4) is wholly distinguishable, the ground of decision there being the entrusting of a gun in a dangerous condition to a servant who was an inexperienced child, unfit to be entrusted with it.

Here the relation of master and servant did not exist. And the fact that the author of the mischief was the defendant's son is an immaterial circumstance. So is the proximity of the public road. Because the gun was on the defendant's land, where, if not interfered with, it would injure no one. If young Creed took the gun across some fields, and shot some one there in a field, would the defendant be liable? Or if he did the mischief in a village a mile off?

The defendant had no reason to expect that the plaintiff would be on that day in the place where he met with the accident. Therefore he owed the plaintiff no duty, and his negligence, involving

(1) L. R. 7 C. P. 253.
(2) 1 Q. B. 29.
(3) 10 *Times* L. R. 41.
(4) 5 M. & S. 198; Starkie, 1 Nisi Prius Cases, 287; Holt, N. P. 233 (n.).

no breach of duty to the plaintiff, does not render him liable: *Tolhausen* v. *Davis* (5).

R. Barry, K.C., and *Carrigan*, for the respondent:—

This case is not distinguishable from *Dixon* v. *Bell* (2), the decision in which has never been questioned. *Lynch* v. *Nurdin* (3) and *Williams* v. *Eady* (4), show that it is actionable negligence to leave dangerous things lying about where boys may get at them and do mischief with them. In such cases the defence that the accident is the result of the independent act of the boy does not arise. It is precluded by the original negligence on the part of the person who leaves the dangerous article carelessly lying in the way of persons whose natural tendency is to meddle with it. There is a duty thrown on a man who keeps a gun to guard against accidents happening through another person handling it carelessly. Experience shows that if loaded firearms are left within reach of children, no consequence is more natural or probable than that children will discharge them to the injury of themselves or others. *Dixon* v. *Bell* (2); *Illidge* v. *Goodwin* (5); *Lynch* v. *Nurdin* (3); *Engelhart* v. *Farrant* (6), and *Clark* v. *Chambers* (7), all show that the defendant was guilty of negligence. There was no original negligence on the part of the Railway Company in *M'Dowall* v. *Great Western Railway Company* (8). [They also cited: *The Bernina* (9); *Mills* v. *Armstrong* (10); *Potter* v. *Faulkner* (11).]

Cur. adv. vult.

Nov. 20.

FITZ GIBBON, L.J.:—

This is in any view a deplorable case. The plaintiff has lost an eye, for which the sum awarded by the jury cannot adequately compensate him. If the defendant is legally responsible for the act of his son, who did the mischief, the litigation may ruin him, and in any event he must feel that but for what

(1) 57 L. J. Q. B. 392-395; 58 L. J. Q. B. 98.
(2) 5 M. & S. 198.
(3) 1 Q. B. 29.
(4) 10 *Times* L. R. 41.
(5) 5 C. & P. 190.
(6) [1897] 1 Q. B. 240.
(7) 3 Q. B. D. 327.
(8) [1903] 2 K. B. 331.
(9) 12 P. D. 36.
(10) 13 App. Cas. 1.
(11) 1 B. & S. at p. 805—Erle, C.J.

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was at best his thoughtlessness, the misfortune would not have happened.

The question for us is one of legal liability; it depends upon principles illustrated by many cases. The Judges in the Court below thought this case near the border line, that is, almost admitting a decision either way, as often happens where the result depends upon a balance of considerations.

It is clear to us from what occurred at the trial that the only question now open is whether there was sufficient evidence to sustain a verdict for the plaintiff upon whatever issues properly arose upon the evidence given. The Judge reports that after the plaintiff had closed his case the defendant called no evidence, and that his counsel asked for a direction on three grounds, viz. :—

> 1. "That the injuries arose from the wilful act of a third party of upwards of fourteen years of age, and that there is no legal liability on the defendant for the act of such party;
>
> 2. "That there was no legal duty on the part of the defendant towards the general public to guard against the boy obtaining possession of the gun;
>
> 3. "That the injuries were not the reasonable and natural result of a failure of duty by the defendant."
>
> "It is admitted on both sides that the question is one of law, and that it is desirable to take the opinion of the jury on the question of damages.
>
> "The jury find £50 damages on the assumption of the defendant's liability."

When the plaintiff had closed his evidence, and the defendant called no evidence, the plaintiff's counsel could treat the question as one of law, if—but only if—on evidence admitted to be true the plaintiff was entitled to the verdict. The defendant's counsel, on the other hand, could not reduce the case to a question of law unless he was entitled to call for a direction upon the ground that the plaintiff's evidence, treated as true, was insufficient to sustain a verdict. In fair play to counsel, and having regard to common practice, we must take it as assumed that the jury would have found for the plaintiff upon any question of fact properly arising, if the evidence given, treating it as uncontroverted, was sufficient in law to support the finding—in other words, that the jury assessed damages by consent contingently

upon there being evidence legally sufficient to sustain a verdict for the plaintiff.

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In no view could the case have been withdrawn from the jury, or reduced to a question of law, if there was evidence to sustain a verdict for the plaintiff; and the course of the trial is unintelligible unless the jury was prepared to find, and is to be presumed to have found, for the plaintiff on every material issue arising upon the evidence given on his behalf.

The non-production of the defendant is unsatisfactory, because it compels us to decide upon incomplete materials whether there was evidence to go to the jury. But this cannot improve his position. His counsel probably acted wisely in not producing him, for his explanation of his conduct about the gun might have made his case worse. But we can infer nothing in his favour from his having neither contradicted, corrected, nor explained away the case made against him by the plaintiff.

The principle to be derived from the numerous authorities seems to be this:—Where an injury has been suffered which would not have happened but for the action of more than one person, no one of the several persons whose action led up to the injury will be answerable in damages for it unless his action *caused* it; and it should be held to have caused it, if a man of ordinary prudence, having regard to all the circumstances, ought to have anticipated the injury as a not improbable—"*likely*" is too strong—consequence of his action. If so, he is responsible, notwithstanding that the injury would not have happened but for the independent act of a third party. All third party cases are difficult, because in tracing the chain of cause and effect, circumstances often make it almost impossible to distinguish between a flaw and a break, or to say whether the intervention of the third party has not so far predominated in bringing about the injury as to make it right to say that the act of the original party was not an effective cause of the ultimate result.

What are the facts? The defendant on a Sunday morning was going to shoot rabbits, carrying a loaded gun on full cock; being called away, he laid the gun in that state out of his hand, leaning against a fence of his own field, inside a gap or stile on a pathway from a high road to his house, where anyone using the

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pathway would see it. I must express my surprise that Boyd, J., should have thought that the defendant was not guilty of actionable negligence in thus leaving the gun. Would not anyone finding it in such a position be justified in assuming that it was not loaded and on full cock? If the son, in picking it up to take it home, had shot himself, would not the father have been morally and legally responsible? If it had fallen, or had been accidentally knocked down, and had gone off and done mischief, would the result not have been caused by its having been left in an improper place, and in a dangerous condition? Books and newspapers are full of accidents happening from the incautious handling of loaded guns, especially often by persons most familiar with their use, *e.g.* soldiers and sportsmen; the victims are usually relatives or friends, and the intention to do harm is wholly absent. To suggest that a man who lays a loaded gun on full cock against the fence of the pathway to his house, in full view of every passer-by, is not guilty of negligence, is contrary to my estimate of the judgment of ordinary men. How often have we heard young people warned, even about unloaded guns—"Charged, or not charged, she's dangerous." "Don't point that gun: the devil might load it unbeknownst"—are proverbial Irish cautions, but they are none the less prudent counsel.

We should not unreasonably extend the duty. But the duty is to use reasonable care to prevent any mischief of which there ought to be a reasonable apprehension. The measure of reasonable care is to be gauged by the measure of risk. In the case of a gun loaded and on full cock, the measure of care is at its *maximum*. The scope of duty is the scope of danger, and it extends to every person into whose hands a prudent man might reasonably expect the gun to come, having regard to the place where he left it. The ground of liability here is not that the boy was the defendant's son, but the fact that the gun was left without warning, in a dangerous condition, within reach of persons using the pathway, and the boy was one of the very class of persons whom the defendant knew to be not only likely but certain to pass by, viz. his own household. If they were at Mass, the very time at which they were to pass coincides with the moment when he interrupted the reading of his newspaper on remembering the gun, unfortunately just too late.

So far, I hold that the defendant must be responsible for every direct consequence of the gun being taken up by his son under circumstances which reasonably entitled anyone who found it to assume that it was not both loaded and cocked. There was a breach of duty towards the son himself if he had been injured by its going off as he lifted it. Initial negligence of the father being thus shown, the question is reduced to this—whether the son's act, when he got the gun, was so independent of the father's negligence, and so far outside the range of reasonable anticipation, as to make it the sole cause of the injury, and to absolve the father.

Numerous cases have established that leaving a dangerous thing within the reach of others, without warning, creates a responsibility, by way of cause and effect, for the result of an unauthorized and negligent, reckless, or even criminal act of a third person into whose hands the dangerous thing has fallen. The negligence, recklessness, or criminality of the act of the third person is treated as mitigated by his right to assume that the thing was not so dangerous, or was not in a condition so dangerous, that leaving it where or as he found it exposed him or others to any special and undisclosed risk of injury. Injury directly and not unnaturally arising from the third party's acting on that assumption is treated as the effect of the negligence which originated the danger.

What the boy did is thus stated in the Judge's note:—

> "I saw the gun. It was up against the ditch near the gap. I saw it the moment I went in through the gap. I was fiddling with the gun. I did not know it was loaded. I was playing with it."

The anticipation of any misfortune which was not improbable as a consequence of his act was the defendant's duty, and every person who might not improbably be injured was within the scope of that duty. Several cases have already gone further than is necessary to fix liability on the present defendant.

The force of the decision in *Dixon* v. *Bell* (1) cannot be fully understood without gathering the facts from the three reports. The defendant there had done much more than Creed did to avoid danger. He told the girl whom he sent to fetch the gun that it

(1) 5 M. & S. 198; s. c. at Nisi Prius, 1 Stark. 287; Holt, 233 (n.).

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was loaded. He told her to get a man to remove the priming; she did so, and then brought the gun to the defendant's house, and laid it down there. His directions were thus carried out, and her "employment" apparently ended. She took the gun up again on the plaintiff's coming in, and presented it at him. The priming had not been wholly removed, or some powder had come into the touch-hole; the gun went off, and injured the plaintiff. The defendant was held responsible on the ground that he had not taken the amount of care which the law required, because it was his duty to secure the innocuousness of the weapon which he had made dangerous by loading it. Lord Ellenborough said:—

> "It was incumbent on him, who by charging the gun had made it capable of doing mischief, to render it safe and innocuous."

Illidge v. *Goodwin* (1) is important for the *dictum* of Tindal, C.J. The defendant's cart and horse were left standing unattended in the street; the horse backed the cart against the plaintiff's window. Two witnesses for the defence swore to the striking of the horse by a passer-by; the jury interposed, saying that they did not believe them, and Tindal, C.J., said:—

> "After all, supposing them to be speaking the truth, it does not amount to a defence. If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done."

In *Lynch* v. *Nurdin* (2) it was stated that among the risks to be guarded against was the natural instinct of a child to amuse himself by meddling with dangerous things; and Denman, C.J., illustrated his argument by putting the case of a gamekeeper leaving a loaded gun against a wall in the playground of schoolboys, where it might be expected that one of them might pick it up and point it at another; and he said that in such a case the gamekeeper would have to answer in damages to any boy injured by the gun.

Clark v. *Chambers* (3) followed *Lynch* v. *Nurdin* (2). The defendant without legal right had put *chevaux-de-frise* across a private roadway to prevent vehicles from coming up to his land. Some person, without his authority, removed part of the barrier to

(1) 5 C. & P. 192. (2) 1 Q. B. 29. (3) 3 Q. B. D. 327.

the footpath, and on a dark night the plaintiff, while lawfully using the road, knocked against one of the spikes and injured his eye. The defendant was held liable, although the immediate cause of the accident was the act of the stranger who had placed the barrier on the footpath. Cockburn, C.J., says (p. 339) :—

> "It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to anyone who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion."

How can I doubt that the negligence of the defendant here gave occasion to the imprudent and unauthorized act of his son, which realized the mischief?

In *Engelhart* v. *Farrant & Co.* (1) two servants were sent out by the defendant in a van—one, Mears, to drive it, with instructions not to leave it; the other, a lad named Tucker, to deliver parcels, expressly forbidden to drive. The driver left the van and went into a house. In his absence the lad drove on, and collided with the plaintiff's carriage. It was held that the negligence of the driver in leaving the cart was the effective cause of the damage, and that the defendant was liable. There are passages in the judgments which apply here. Lord Esher, M.R., says (p. 243) :—

> "If it is necessary to draw any inference about the probability, if Mears had done what he ought to do, and had thought what was the probable result of his going away and leaving the cart with the lad in it, I think it is inevitable to come to the conclusion that he would have thought he was doing a dangerous thing. Leaving that lad in the cart with the means of driving off at any moment makes what Mears did an effective cause of what happened afterwards."

Lopes, L.J., says (p. 246) :—

> "It was Mears' blamable carelessness which induced Tucker to do what he did."

(1) [1897] 1 Q. B. 240.

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Surely here it was the father's blamable carelessness which induced the son to do what he did.

Williams v. *Eady* (1) seems to me to be an extreme case. The defendant, a schoolmaster, was held liable to one of his pupils for an injury resulting from the careless act of another boy in handling phosphorus. The phosphorus bottle seems to have been locked up, and the key kept in the kitchen; but some one had got it surreptitiously, and left it in the conservatory; there it was found by the boys; one of them put a lighted match into it and put in the stopper. He afterwards opened it to look at it, when the bottle burst and the plaintiff was injured. The Judge directed the jury that if a man keeps dangerous things he must keep them safely, and take such precautions as a prudent man would take, and he said that to leave such things about in the way of boys was not reasonable care, even taking the defendant's account that the bottle was kept locked up, and the key in the kitchen. The jury found for the plaintiff, and the Court of Appeal upheld the verdict. Lord Esher, M.R., said:—

> "As to the law on the subject there could be no doubt, and it was correctly laid down by the learned Judge that the schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a schoolmaster. Then he was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way. Then, having phosphorus in his house, he was bound not to leave it in any place in which they might get at it; and so, if he left it in the conservatory, he did not use due care, but otherwise if he kept it locked up. If, therefore, the defendant kept the bottle locked up, there would be no evidence of negligence. But if the bottle was left in the conservatory for any time before the accident, then there was evidence on which the jury might find negligence, and a want of proper care for the safety of the boys."

If this be the law, it carries the responsibility of those who must keep dangerous things for the purpose of teaching "Physical Science" in our schools much beyond what the decision now under appeal has laid upon the defendant.

(1) 10 *Times* L. R. 41.

In *M'Dowall* v. *Great Western Railway* (1), the Court of Appeal approved of the decision in *Engelhart* v. *Farrant* (2). But when we understand the ground upon which the judgment of Kennedy, J., was reversed, the case does not help the defendant. I confess that the observations of Vaughan-Williams, L.J., seem strong, as applied to the facts. The first question put to the jury was—

> "Was the van, in regard to persons using the highway, where the plaintiff was, in a safe position as and when it was left by the defendant' servants, unless interfered with afterwards? *Answer*—Yes."

I ask here—"Was the gun, in regard to persons using the pathway as the defendant's son was, in a safe position as and when it was left by the defendant, unless interfered with afterwards?" I should answer—"Certainly not." It might have been thrown down by any passing person or animal, and being loaded and on full cock it might have gone off in falling, and done mischief. But this question of fact, which must be treated as found against the defendant here, was found for the defendants in *M'Dowall's Case* (1). Vaughan-Williams, L.J., proceeds to discuss the conduct of the boys who loosed the brake, and let the van run down the incline to the level crossing, and he comes to the conclusion that—

> "there is nothing in the past history of the conduct of those boys, as regards vehicles left on the rails at this point, to lead one to anticipate that they would go and uncouple a vehicle and let it down the incline, as they did in the present instance."

He next deals with the question of negligence on the Company's part in not placing the van above the catch-points, and he holds that there is nothing to justify the finding that not so placing the van was an effective cause of the accident. But as to the law, he says:—

> "In every case in which the circumstances are such that anyone of common sense having the custody of, or control over, a particular thing would recognize the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury."

On that principle the defendant here must be responsible.

(1) [1902] 1 K. B. 618; [1903] 2 K. B. 331. (2) [1897] 1 Q. B. 240.

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Romer, L.J., says:—

"Clearly, as found by the jury, when this train was left where it was by the Railway Company, with the precautions taken by them, it was perfectly safe. It was not left in any condition in which it could be said that there was any negligence on the part of the Railway Company under the circumstance, unless you can find some evidence of negligence by reason of the evidence relating to the mischievous boys: in other words, unless it is plain that the evidence relating to the mischievous boys turned that act, which was otherwise a proper act on the part of the Company, into a negligent one. Upon that, having considered that evidence, it does not appear to me that upon it the jury could reasonably find that the Railway Company ought, under the circumstances in which they left this train, reasonably to have anticipated that the boys would do, or might have done, what they in fact did, or that there was at the time known to the Company any such risk of the particular acts of the boys which caused the accident, as called upon the Railway Company to take further precautions against those particular acts; and that being so, it appears to me that the findings upon which the learned Judge below acted cannot be relied upon on behalf of the plaintiff, and that the appeal ought to succeed."

No one can say that the jury here would have been wrong in finding that the gun, as and when it was left by the defendant, was dangerous. He took no precaution whatever. The thoughtless boy here turned a grossly negligent act into an injurious one. The handling of the dangerous gun by the defendant's son as he was coming home ought to have been anticipated, and so ought his "fiddling with it," in ignorance of its dangerous condition.

I must read a passage of great interest on the law of Homicide from "Foster's Crown Law" (Dublin Edition, 1767, p. 263). The learned author on the subject of "due caution" says:—

"I cannot pass over a case reported by Keiling (Keil. 41), because I think it an extreme hard case and of very extensive influence. A man found a pistol in the street, which he had reason to believe was not loaded, *having tried it with a rammer*. He carried it home and showed it to his wife, and she standing before it, he pulled up the cock and touched the trigger. The pistol went off and killed the woman. This was ruled manslaughter. It appeareth that the learned editor was not satisfied with the judgment. It is one of the cases he, in the preface to the report, recommendeth to further consideration. Admitting that the judgment was strictly legal, it was, to say no better of it, *Summum*

Jus. I cannot help saying that the rule of law I have been considering in this place touching the consequences of taking or not taking due precaution doth not seem to be sufficiently tempered with mercy. . . . This I have said upon a supposition that the judgment reported by Keiling was strictly legal. I think it was not. For the law in these cases doth not require the *utmost* caution that *can* be used; it is sufficient that a reasonable precaution, what is *usual and ordinary* in the like cases, be taken. . . . The man in the case under consideration examined the pistol in the ordinary way. Perhaps the rammer, which he had not tried before, was too short, and deceived him. But having used the ordinary caution, found to have been effectual in like cases, he ought to have been excused.

"I have been the longer upon this case because accidents of this lamentable kind may be the lot of the wisest and best of mankind, and most commonly fall amongst the nearest friends and relations. And in such a case the forfeiture of goods rigorously exacted would be heaping affliction on the head of the afflicted, and galling an heart already wounded past cure. It would even aggravate the loss of a brother, a parent, a child, or wife, if such a loss under such circumstances is capable of aggravation.

"I once upon the circuit tried a man for the death of his wife by the like accident. Upon a Sunday morning the man and his wife went a mile or two from home with some neighbours, to take dinner at the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way. But before he went to dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church, and in the evening returned home with his wife and neighbours, bringing his gun with him, which was carried into the room where his wife was, she having brought it part of the way. He, taking it up, touched the trigger, and the gun went off and killed his wife, whom he dearly loved. It came out in evidence that while the man was at church a person belonging to the family privately took up the gun, charged it, and went after some game; but before the service at church was ended, returned it loaded to the place whence he took it, and where the defendant, who was ignorant of all that had passed, found it, to all appearance as he left it. I did not inquire whether the poor man had examined the gun before he carried it home; but being of opinion, upon the whole evidence, that he had *reasonable grounds to believe that it was not loaded*, I directed the jury that if they were of the same opinion they should acquit him, and he was acquitted."

Does not this passage furnish a conclusive argument to show that to leave a gun as this defendant left it was even criminally

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negligent, and that he would have been answerable upon an indictment for the misfortune which followed?

I am clearly of opinion that the defendant's thoughtless, reckless conduct gave occasion to the plaintiff's injury, and so far *caused* that injury as to make the defendant liable in damages. Accordingly, I hold that the appeal must be dismissed, with costs.

WALKER, L.J.:—

In this case, in which the defendant has been sued for negligence, there has occurred the interposition of the negligence of another person between the defendant's primary negligence and the accident, and there, therefore, arises a difficulty which has frequently existed, viz. to whose negligence is the accident to be attributed? If the negligence of the defendant was the effective cause of the accident, he is liable; but if the effective cause was the intervening act of the third party, then such third party alone is liable. Both may be liable, as appears by the case of *The Bernina* (1). I quite agree with an observation made by Lopes, L.J., in *Engelhart* v. *Farrant* (2):—"It is impossible to reconcile the various decisions with regard to negligence, and the reason is that fact and law are so mixed up in them that they are frequently decisions rather on the facts than on the law, and the variety of facts involved is infinite."

There is no doubt that the primary act which led up to the accident was a grossly negligent act on the part of defendant. Boyd, J., was of opinion that the defendant was not guilty of negligence, which explains his judgment, but I pass over that because it was admitted by Mr. Bourke, and has never been disputed before us, that the defendant was guilty of negligence, and, as Mr. Bourke said, even of gross negligence. The defendant put down a loaded and cocked gun at the entrance from the public road to a footway leading to his house, and went away, apparently forgetting what he had done, and left the gun so for a period which was not proved, but long enough to allow those coming from Mass

(1) 12 P. D. 36; 13 App. Cas. 1. (2) [1897] 1 Q. B. 246.

to his house, or otherwise coming to his house lawfully, to pass along the footway.

I think, under those circumstances, the law will attribute to him a reasonable anticipation that all those who came that way, including the young, the careless, and the inexperienced, might see the gun, meddle with it, or use it carelessly in the highly dangerous condition in which he left it. His son, seeing it, improperly and negligently took it up, and pointed it towards two of his companions, and it either went off, or was fired off, and injured one of them. It is now much too late to contend that if the intervening act of the boy was the proximate cause of the accident, the person who was negligent in the first instance is not liable. As Lord Justice Rigby says in *Engelhart* v. *Farrant* (1):—"It was argued, with some show of authority I agree, that wherever, between the negligence of a servant and the incident, the act of some third person intervenes, and is the proximate cause of the accident, the employer is not liable. I do not consider that is the state of the law upon the authorities; there are," he says, "numerous cases." Such being the state of the law, the question is, was the defendant's negligence the effective cause, or, in other words, the cause to which really the accident is due? The act of each is *causa sine qua non.*

The case for the defendant was presented in various ways. It was said the defendant could not reasonably have contemplated that his son would pass that way, and see the gun and take it; (2) that he could not anticipate that he would take it up and fire it at his companions; and (3), that as the act was one of a boy of fifteen, who criminally and recklessly stepped on the road and fired the gun, this was such an independent and separate act of a responsible person that the defendant could not be held liable, though he was negligent in leaving the gun where he placed it.

Now, in the first place, I think, upon the authorities, and on the reason of the thing, the defendant must be taken to have anticipated the reasonable probability of persons, including the young, careless, and inexperienced in firearms, passing along, and seeing the gun, and taking it up. Is that all he was bound

(1) [1897] 1 Q. B. 240.

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to anticipate, or also that if a boy of fifteen took hold of it he might not use it in that careless or reckless manner in which a boy might? I can quite understand that in many cases there may be such a line of separation drawn between the act of negligence and the subsequent act, which occasions the injury, that they must be treated, so far as regards the relation of cause and effect, as independent acts. Each case must depend on its own circumstances; but, in my opinion, where, as in this case, the intervening act is almost a momentary one, arising immediately out of the negligence which gave occasion and opportunity for the intervening act, it is impossible to say that the original negligence has not been that to which the intervening act is to be attributed. The occasion was operative all the time, and the negligence was taken advantage of at once, and there is no ground for dividing the intervening act into two—one impulse of boyish freak and folly actuated the whole act.

I think the authorities which have been referred to, in which the defendant was held liable, though there was an intervening act, are quite in point on all the grounds on which the defendant relies.

I shall mention some of them. *Scott* v. *Shepherd* (1) seems to have been the first case, and it is referred to by Chief Justice Cockburn in *Clark* v. *Chambers* (2). In that case there was one continuous consequence flowing from the original act.

The effect of the case of *Dixon* v. *Bell* (3) has been attempted to be weakened by the allegation that it turned merely upon the ordinary law of master and servant, and the defendant was held responsible for the act of the girl, his servant. That is not the real ground of the decision, however it may have been presented alternatively in pleading or at the trial. In no view could the girl have been acting within the scope of her authority. *Dixon* v. *Bell* (3), for the full statement of which I refer to the judgment of the Lord Chief Baron, has always been treated as an authority on that branch of the law which deals with consequences resulting from the negligent dealing with a dangerous instrument. In 3 Russell on Crimes, 177, it is said that the defendant Bell might

(1) 3 Wils. 403. (2) 3 Q. B. D. 327. (3) 5 M. & S. 198.

have been indicted for manslaughter if the child fired at had been killed.

In *Lynch* v. *Nurdin* (1) the defendant left his horse and cart unattended in a street; the plaintiff, a child of seven years, got into the cart; another child led the horse on, and the plaintiff fell off the shaft and was hurt. There were two questions; the only one material here is the one of the intervening act, on which Lord Denman says:—"If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." Then he gives the illustration of the gamekeeper.

The preceding case of *Illidge* v. *Goodwin* (2) removes any argument arising from the intervener being a child, for there a defendant left his cart and horse in the street, and a passer-by whipped the horse, which caused it to back against the plaintiff's window, and it was urged that the man who whipped the horse, and not defendant, was liable. Tindal, C.J., said:—"If a man chooses to leave a cart standing in the street he must take the risk of any mischief that may be done." The act which proximately caused the injury there was the act of a grown man, for whose act, however, defendant was held responsible, having regard to the original negligence, which was held to be the effective cause.

Murphy v. *Great Northern Railway Company* (3) was strongly relied on, but there on the facts the misconduct of the badge porters was the effective cause of the accident, and there was no finding that the railway porters left the barrow in an unsafe position, and it seems to have been the opinion of the Judge at the trial that it was left safe. On the facts the defendants could not reasonably have foreseen the misconduct of the badge porters.

In *Clark* v. *Chambers* (4) the defendant occupied premises abutting on a private road, consisting of a carriage-way and footpath. He unlawfully erected a barrier across the road, through which there was a gap, usually open for the passage of vehicles, but

(1) 1 Q. B. 29.
(2) 5 C. & P. 190.
(3) [1897] 2 I. R. 301.
(4) 3 Q. B. D. 327.

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sometimes closed by a pole. Some third person, without defendant's authority or knowledge, removed a part of the barrier armed with spikes, and put it in an upright position across the footpath, and the plaintiff, lawfully using the footpath at night, came into contact with the spikes and was injured. Cockburn, C.J., reviewed all the cases, and adopted as settled law the decisions in *Dixon* v. *Bell* (1) and *Lynch* v. *Nurdin* (2), and held that though the immediate cause of the mischief was the act of a third party, the defendant as original author of the mischief was liable. He says:—"A man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction by some one entitled to use the way as a thing likely to happen, and if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near; thus, if the obstruction be to the carriage-way, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage for which, should injury to an innocent party occur, the original author of the mischief should be held responsible."

Thus, the negligent person there had to contemplate the compound act of the removal of the obstruction, and its being deposited in a dangerous place near, and he was not protected because the act which proximately caused the mischief was the imprudent and unauthorized act of another, whoever he may have been, even the deliberate act of a grown person.

To illustrate what I think the defendant should reasonably be taken to contemplate when he left this gun as he did—suppose he left it beside a path used by boys coming from or going to school, he would be charged with knowledge of their habits, just as much as if he had left it in their playground. The case of *Williams* v. *Eady* (3) and the illustration put in *Lynch* v. *Nurdin* (2) show this. It is only a question of degree. The defendant's son of fifteen would pass naturally by this gun coming from Mass. He was just of the age at which it would be more likely that he would meddle with the gun than if he was much younger.

(1) 5 M. & S. 198. (2) 1 Q. B. 29. (3) 10 *Times* L. R. 41.

Lord Esher, in *Engelhart* v. *Farrant* (1), puts a test for ascertaining the effective cause of the mischief, which, I think, applies. "If," he says, "Mears had thought what was the probable result of his going away and leaving the cart with the lad in it, I think it is inevitable to come to the conclusion that he should have thought he was doing a dangerous thing." So, I think, if the defendant had remembered, even when reading his newspaper, that he had left this gun where his boy would pass, he should have gone and put the gun in a safe place, or safe condition; his not having done that made the leaving of it where it was the effective cause.

The case of *M'Dowall* v. *Great Western Railway Company* (2), on the facts as interpreted in the Court of Appeal, gives no support to defendant. They considered that the van was left safe, and, therefore, there was no initial negligence. That is the ground of the judgment of Vaughan-Williams, L.J.; but he, no doubt, goes a little further, as Mr. Bourke pointed out, and says:—"But let me for a moment assume that there was evidence to go to the jury of neglect by the defendants of that care which a reasonable man would have taken to avoid what I may call 'obvious dangers.' Even in that case, it seems to me that the rule which was laid down by Lord Esher in *Engelhart* v. *Farrant* (1) is the rule which we must apply. He says this (at p. 243):—'If a stranger interferes, it does not follow that the defendant is liable; but equally, it does not follow that because a stranger interferes the defendant is not liable if the negligence of a servant of his is the effective cause of the accident.' Even assuming any neglect of duty here by the railway company, what one has to ask oneself is this: 'Was the neglect by the railway company of precautions the effective cause of this accident?' I confess I think, on this evidence, such neglect was not the effective cause of this accident, and, as Lord Esher says, if it was not, that means that the defendants are not liable." It is obvious, I think, that his conclusion is coloured by his ideas about the original safety of the van, but, in any event, as regards reasonable anticipations of danger from the act of a boy, the case is very different where a

(1) [1897] 1 Q. B. 243. (3) [1903] 2 K. B. 331.

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van was left loaded, braked and coupled by a screw coupling to the train, and it was safe unless boys trespassed, uncoupled the van, and released the brake, and there was no evidence that they had ever loosed a van or vehicle before, and, therefore, as an inference of fact, the Lord Justice would not hold that the anticipation of the danger of their doing this could be attributed to defendants; but here the loaded gun was ready to the boy's hand cocked, though he was not aware of the danger involved.

Upon the whole, for the reasons I have referred to, I am of opinion that the admitted negligence of the defendant was the effective cause of the injury to the plaintiff.

I have gone into the case at length, in order to show my own view of the facts and inferences arising from them. But on the reservation it would probably be enough to entitle the plaintiff to the verdict for £50, that there was evidence to go to the jury of negligence, and that the defendant, as a reasonable man, ought reasonably to have anticipated the consequences which ensued.

HOLMES, L.J.:—

The question of law arising on this appeal would in any circumstances be one of some difficulty; and it is made more difficult in this case by the meagre and incomplete character of the evidence, a defect for which I think both parties are equally responsible. My mind fluctuated during the argument, but I have been able to arrive at a conclusion which seems to me to be sound, and the reasons for which I can state in a few sentences without reference to the authorities already fully examined by my colleagues, and by the Divisional Court. In most, if not in all, actions to recover damages for personal injuries caused by the negligence of the defendant, the latter is entitled to have findings of the jury—(1) as to whether he was guilty of any negligence; and (2), if so, as to whether the injuries were caused by such negligence. These questions are not always put in the same form of words. The Judge in the exercise of his discretion adapts them to the circumstances of the case, and uses the language best suited to direct attention to the material points in issue. In this case they would probably have taken some such shape as this—Was the defendant guilty of negligence in leaving his loaded gun at

the place and in the position described in the evidence? If so, ought he to have contemplated that, as a result of his negligence, some person might take possession of the gun and use it so negligently as to cause injury to a third person in the neighbourhood? Were the plaintiff's injuries caused by such negligent use of the gun by Daniel Creed? It was the defendant's right, as I have already mentioned, to have these or some similar questions submitted to the jury; but his counsel, instead of requiring this, asked for a direction. I have no doubt that in so doing he acted prudently; but by allowing the damage to be assessed, and by accepting the ruling of the Judge, he admitted that if there was any evidence on which the jury could act, they would have found every material issue against him. In this state of things the question in the Divisional Court and here is, whether there is evidence to sustain a verdict and judgment for the plaintiff.

Returning to the questions I have formulated, I have no doubt that it was evidence of negligence to leave the gun loaded and on full cock beside the pathway leading to defendant's residence, by which people went to and came from the house. It might have been discharged by an accidental touch or push from one of those persons, and serious injury might have resulted to him or some one else. Therefore the first question could not have been withdrawn from the jury. The second question introduces the element of a third party getting possession of the gun. There is no evidence of how the path was used, but the jury were at liberty to infer that it was used to some extent; and their knowledge of the world would tell them that a gun casually laid aside has a great fascination for some people, who seem to have a natural impulse to handle and examine it, and who often do so in so careless and unskilful a way as that it is discharged without intention on their part. I do not attach much importance to the age of the defendant's son. He was old enough to know that it was dangerous to handle the gun on full cock, which had evidently been placed where he found it for some temporary purpose by a person who had been using it; and in my own reading and experience negligence in connexion with firearms is as common in the case of men as of boys. Quite irrespective of the age of the persons who might use the path, I think that there was evidence from which

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the jury were at liberty to find that the defendant, when placing the gun against the fence, ought to have contemplated that it might fall into negligent hands. The third issue I have suggested—whether the plaintiff's injuries were caused by Daniel Creed's negligence—is, in my opinion, attended with greater difficulty than the others. For some time I was unable to account for the accident consistently with the evidence except as a consequence of the boy directing the gun towards his comrades and wilfully discharging it. If he did not actually know that it was loaded, it is difficult to believe that he did not suspect it; and although I am sure he had no intention of hitting the boys, I fear his object was to frighten them. Now I hold that in a case of this kind there is a marked distinction between a negligent act and a wilful act. A man who negligently lays aside a loaded gun ought to contemplate that it may be taken up by a person who will handle or use it negligently. But I think it would not be within reasonable contemplation that the finder of it would wilfully discharge it at another. I have, however, satisfied myself on further consideration that I am not called on to decide this question in the present case, for I am now of opinion that the jury might have inferred from the evidence that the boy desired merely to show the gun to his comrades, and that while doing so it was accidentally discharged. I know not whether the jury would have taken this view or not; but as there is some evidence to support it, I am bound to assume that it would. For those reasons I concur in the judgment of the Court.

Solicitor for the plaintiff: *W. J. Dunlea.*
Solicitor for the defendant: *J. J. Foley.*

G. Y. D.

THE ANTRIM COUNTY LAND, BUILDING, AND INVESTMENT COMPANY, LTD., AND JOHN HOUSTON *v.* JOHN STEWART AND WILLIAM STEWART (1).

(1902. No. 1896.)

K. B. Div. 1903. Feb. 10, 28. *Appeal.* May 5, 6.

Landlord and tenant—Action for recovery of land—Title—Second mortgagee against mortgagor—Legal estate outstanding.

The defendants bought their farm from their landlord, through the Land Commission, under the Land Purchase Acts, in 1886, and by deed dated the 12th August, 1886, the lands were conveyed to them in fee. By the same deed the defendants mortgaged the land to the Irish Land Commission as security for the repayment of the purchase annuity. By a mortgage, dated the 4th May, 1901, the defendants mortgaged the land to the Antrim Building Company to secure the repayment of £1000. The mortgage contained a power of sale and an express statement of the mortgage to the Land Commission. The Antrim Building Company sold the land under the power of sale to Houston.

In an action of ejectment on the title by the Company and Houston as co-plaintiffs:—

Held, by the King's Bench Division, that the judgment should be changed into one for the defendants. *Per* Lord O'Brien: That having regard to the decision of *Hodgens* v. *O'Donoghue* (28 I. L. T. R. 98), which a Court of first instance could not overrule, the judgment should be entered for the defendants.

Held, by the Court of Appeal (reversing the King's Bench Division, and restoring the judgment of Kenny, J., at the trial), that the defendants could not set up, as a defence, that the legal estate was outstanding in the Land Commission, and that the plaintiffs were entitled to possession without bringing the Land Commission before the Court.

EJECTMENT on the title brought to recover possession of part of the lands of Aghahaskin, in the county of Londonderry, containing 48A. 0R. 21P. held by the defendants in fee-simple, subject to an annuity of £24 2*s*. 10*d*. payable to the Irish Land Commission for forty-nine years from the 1st November, 1886.

The defendants had purchased the land from their landlord under the Land Purchase Acts, and by deed dated the 12th August, 1886, the lands were conveyed to the defendants in fee-simple, and by the same deed the defendants mortgaged the land to the Irish Land Commission to secure the payment of an annuity

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and MADDEN, J.

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of £24 2*s.* 10*d.*, payable to the Land Commission for forty-nine years from the 1st November, 1886, being the annual instalments of the purchase-money. By indenture dated the 4th May, 1901, the defendants as beneficial owners granted the lands to the Antrim Building Company (the first named plaintiffs) by way of mortgage to secure the repayment of £1000 and interest. This deed expressly referred to the former mortgage of the 12th August, 1886, and it contained a power of sale. On the 27th Febuary, 1902, the Antrim Building Company, in exercise of their power, put up the lands for sale by public auction, and the plaintiff John Houston was declared purchaser, and signed an agreement for completion of the purchase, but no conveyance of the lands had been executed to him. The defendants refused to give up possession, and the action was brought by the Antrim Building Company and Houston. The defendants pleaded possession.

At the trial before Kenny, J., without a jury, on the 14th February, 1903, his Lordship gave judgment for the plaintiffs with costs. The defendants moved to set aside the judgment, and to enter judgment for the defendants.

Bartley, for the defendants.

Christie, for the plaintiffs.

Feb. 28.

LORD O'BRIEN, L.C.J.:—

We are of opinion that this case is governed by that of *Hodgens* v. *O'Donoghue* (1), which was decided by the Lord Chief Baron and Mr. Justice Murphy, in which it was held that an action of ejectment is not maintainable by a *puisne* incumbrancer where the legal estate is outstanding in a prior incumbrancer who is not a party to the action. There is a decision opposed to that of the Lord Chief Baron of *Browne* v. *Hallissy* (2); that case was before the Chief Baron and Mr. Justice Murphy in *Hodgens* v. *O'Donoghue* (1), and they refused to follow it, and refused to follow it on the distinct ground that it was wrongly decided, and this after the passing of the Judicature Act.

We are bound by the judgment of the Divisional Court in the later case, we have no jurisdiction or authority to disregard that judgment, and if it is to be questioned it must be questioned elsewhere.

(1) 28 I. L. T. R. 98. (2) 12 I. L. T. R. 159.

It occurred to me that as between the two parties to this action, it being merely a possessory action, the mortgagee would be entitled to possession, the mortgagor being in possession, because the owner of the legal estate would be in no way prejudiced. I do not say that I would have acted necessarily on that view if I had considered the point very fully, which I have not, but here we are bound by the judgment in *Hodgens* v. *O'Donoghue* (1), and we must decide in favour of the defendants.

Mr. Christie, who appeared for the plaintiffs, more than once refused to argue the case on the ground of estoppel. The point that the legal estate was outstanding in the Land Commission was not made before Mr. Justice Kenny at the trial of the action; his attention was not called to that fact. We must follow the decision in *Hodgens* v. *O'Donoghue* (1) and decide in favour of the defendants. Both *Hodgens* v. *O'Donoghue* (1) and *Browne* v. *Hallissy* (2) were decided since the passing of the Judicature Act. We are bound by the judgment of *Hodgens* v. *O'Donoghue* (1), and if it is to be questioned, that must be done in the Court of Appeal.

We will give the costs of the trial to the defendants, but no costs of this argument.

MADDEN, J.:—

The case referred to by Mr. Christie, *Doe* d. *Hurst* v. *Clifton* (3), was a case of estoppel, and Mr. Christie could not argue the question of estoppel, having regard to the form of the mortgage in the present case. *Doe* d. *Hurst* v. *Clifton* (3) extended the doctrine of estoppel as laid down by former decisions. It was always held as between mortgagor and mortgagee that the mortgagor was estopped by his deed. He could not derogate from his grant, and set up *jus tertii*, by relying upon a legal estate outstanding in a former mortgagee. The case was different where the earlier mortgage was recited or referred to. The case of *Doe* d. *Hurst* v. *Clifton* (3) applied that principle to a defendant who was not a mortgagor, but who defended in the interests of the mortgagor. That case has no application here, and I concur with the Lord Chief Justice in thinking that the case before us is ruled by the decision of this Court in *Hodgens* v. *O'Donoghue* (1).

R. ST. J. C.

(1) 28 I. L. T. R. 98. (2) 12 I. L. T. R. 159. (3) 4 A. & E. 809.

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The plaintiffs appealed (1).

Matheson, K.C., and *Christie*, for the appellants:—

The mortgagor cannot derogate from his own grant: Robins on Mortgages, vol. I., 654; Everest on Estoppel, 194, 254; Cole on Ejectment, 473, 271; *Goodtitle* v. *Bailey* (2); *Doe* d. *Bristow* v. *Pegge* (3); *Right* d. *Jefferys* v. *Bucknell* (4); *Doe* d. *Ogle* v. *Vickers* (5); *Doe* d. *Hurst* v. *Clifton* (6); *Doe* v. *Horne* (7); *Lindsey* v. *Lindsey* (8); *Doe* d. *Leeming* v. *Skirrow* (9); *Browne* v. *Hallissy* (10); *General Finance Mortgage and Discount Company* v. *Liberator Permanent Building Society* (11). The doctrine of derogation is without reference to the technical doctrine of estoppel: *Right* d. *Jefferys* v. *Bucknell* (4); *General Finance Mortgage and Discount Company* v. *Liberator Permanent Building Society* (11).

The Court will not allow a defendant in ejectment to set up any defence which is against justice and conscience. Assuming that the outstanding legal estate is a bar, it is such a bar as the defendant, prior to the Judicature Act (Ireland), 1877, would have been restrained, by order under section 89 of the Common Law Procedure Act, 1856, from setting up: Wylie, pp. 404, 405; Mitf. Pl., 5 ed., 156–7; Dan. Ch. Pr., 5 ed., 1513; *Blennerhasset* v. *Day* (12); *Olden* v. *Stokes* (13); *Eager* v. *Maunsell* (14); *Thornton* v. *Court* (15); *Bond* v. *Hopkins* (16); *Griffith* v. *Edwards* (17).

It makes no difference that the mortgage under which the legal estate is outstanding is mentioned on the face of the plaintiff's mortgage: *Duke* v. *Ashby* (18). An order as to temporary

(1) In the Court of Appeal, before PALLES, C.B., and FITZ GIBBON, and HOLMES, L.JJ.
(2) 1 Cowper, 597.
(3) 1 Durn. & East, 758.
(4) 2 B. & Ad. 278, note.
(5) 4 Ad. & E. 782.
(6) *Ibid.* 813.
(7) 3 Q. B. 757.
(8) Buller's N. P. 110.
(9) 7 A. & E. 157.
(10) 12 I. L. T. R. 159.
(11) 10 Ch. D. 15, 24.
(12) 2 Ball & B. 104, 137.
(13) 7 I. C. L. R. 602.
(14) I. R. 1 C. L. 159.
(15) 3 De G. M. & G. 293.
(16) 1 Sch. & Lef. 430.
(17) 2 Jur. (N. S.) 584.
(18) 31 L. J. Ex. 168.

bars is, since the Judicature Act of 1877, unnecessary: *Howard* v. *Howard* (1).

An action for the recovery of land is a possessory action, and the judgment pronounced in the action is a judgment *in personam*, not *in rem*: *Howard* v. *Howard* (1). In such an action the real question for decision is the right to the immediate possession. This question sometimes depends for its solution upon the further question whether the equitable title of the plaintiff is superior to that of the defendant. In the case under discussion the defendants, who were mortgagors in possession, "as beneficial owners" conveyed all their estate by way of mortgage to the plaintiffs. Prior to the mortgage the right to the possession and the possession itself were vested in the defendants, subject to the right of the first mortgagee to recover on default of payment by the defendants; and until the first mortgagee took proceedings for recovery the defendants were legally in possession. Their conveyance vested the right to the possession in the plaintiff, subject as above-mentioned, and the conveyance by them "as beneficial owners" implied, under section 7, sub-section (c), of the Conveyancing Act, covenants for right to convey, quiet enjoyment, freedom from incumbrance, and further assurance. The defendants not having any equity as against the plaintiffs, under section 27 of the Judicature Act (Ireland), 1877, "if any plaintiff or petitioner claims to be entitled to any equitable estate or right or to relief upon any equitable ground against any deed, instrument, or contract, or against *any right, title, or claim whatsoever asserted by the defendant* . . . which heretofore could only have been given by a Court of Equity, the said Courts respectively *shall* give to such plaintiff such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act."

Further, the conveyance by the defendants "as beneficial owners" confers upon the plaintiff under the covenant for quiet enjoyment a right of entry if default is made in payment of the money intended to be secured by the mortgage. There was default in this case. "A right of entry is where a man, who has

(1) 30 L. R. Ir. 340, 361; 32 L. R. Ir. 454, 473.

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the possession of lands, is disseised or ousted, or having a right to the possession is kept out of it; in which case he may peaceably make an entry upon the lands or bring an action to recover possession": Carson's Real Property Statutes, 367; Rose on Real Actions, 79; 1 Real Prop. Rep. 493.

Hodgens v. *O'Donoghue* (1) cannot be relied on as an authority in favour of the defendants, as the case does not appear to have been properly argued, and the order setting aside the judgment may have been based on the slip made by the defendant. In *Feehan* v. *Mandeville* (2), Lord O'Brien says that the plaintiff had neither a legal nor an equitable title. *Allen* v. *Woods* (3) is not a case between mortgagee and mortgagor; and the Court could not have given the relief asked, without having the person in whom the legal estate was vested before the Court. Further, Smith, L.J., in his judgment, says:—"It does not appear in whom the equitable title is vested."

The Court must deal with the interests of the parties before it: Order XVI., R. 11; and in order to deal with the matter in controversy in this action so far as regards the rights and interests of the parties before the Court, the presence of the person in whom the legal estate is vested is unnecessary.

Bartley (with him *Henry*, *K.C.*), for the respondents:—

The defendants are entitled to judgment, inasmuch as the legal estate is outstanding in the Land Commission, who must be made parties before the plaintiffs can obtain judgment. The question as to whether the defendants are estopped from raising this point depends entirely on the construction of the deed of mortgage. No estoppel arises by a deed on the face of which the truth appears: *Doe* v. *Scarborough* (4). Here the prior mortgage to the Land Commission is stated in the mortgage to the plaintiffs. The grant as beneficial owners creates no estoppel, nor do ambiguous recitals: *Heath* v. *Crealock* (5); *General Finance Co.* v. *Liberator Permanent Benefit Building Society* (6). There being no estoppel, the case is governed by *Hodgens* v. *O'Donoghue* (1).

(1) 28 Ir. L. T. R. 98.
(2) 28 L. R. Ir. 90.
(3) 68 L. T. 143.
(4) 3 A. & E. 2.
(5) L. R. 10 Ch. 22.
(6) 10 Ch. D. 15.

The suit is defective for want of parties; and the legal estate must be before the Court in order to obtain relief: Wylie, p. 272, 476; Annual Practice for 1903, p. 407. If a person having an equitable title seeks to recover possession of land, he must make the owner of the legal estate a party to the action: *Allen* v. *Woods* (1). If a prior incumbrancer refuses to join as plaintiff, he can be made a defendant.

This is not a case in which temporary bars should be waived. A plaintiff moving to waive temporary bars, in the case of a mortgage, must show that the mortgage debt has been paid off: *Eager* v. *Maunsell* (2); and there is no case of the temporary bar being removed where there was money due on the mortgage: *Right* v. *Bucknell* (3); *Blennerhassett* v. *Day* (4).

PALLES, C.B.:—

May 6.

I am of opinion that this appeal ought to be allowed. It is brought from an order of the King's Bench Division which changed a verdict for the plaintiffs, directed by Kenny, J., at the trial, into one for the defendants. The question as to the effect of the Judicature Act, on which our judgment must depend, although discussed before the King's Bench, is not referred to in the judgments below, and, therefore, we have not the advantage of knowing the view taken of it by the Judges there. As to the question upon which the decision there was based, viz. the proposition that, as the law stood before the Judicature Act, a mortgagor, defendant in an ejectment by a second mortgagee under a mortgage which recited the prior one, was not estopped from relying as a defence upon the legal estate being outstanding, I agree with the view of the King's Bench; and the only reason why I refrain from discussing it at length is that, having regard to the opinion I have formed upon the other question, it does not arise.

The question then upon which the decision of the appeal must rest is one which, having regard to the expected legislation as to land purchase, is of vital moment to purchasing tenants in Ireland, because if the view put forward by Mr. Bartley is right, the sale out

(1) 68 L. T. 143.
(2) I. R. 1 C. L. 159, 162.
(3) 2 B. & Ad. 278.
(3) 2 B. & B. 104.

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of Court by mortgagees of estates purchased through the Land Commission would, so long as any sum remained due on the Government advance, be attended with extreme difficulty, if indeed it would not be practically impossible. Consequently a farm so purchased would for this long period hardly be available as a source of credit. In my opinion this view is not correct. I hold that on the plain construction of the Judicature Act the plaintiff here is, by virtue of his equitable title, entitled to judgment in this action of ejectment, and is so entitled although the Land Commission, in whom the legal estate is, is not before the Court.

It is a mistake to say that the King's Bench Division is a Common Law Court. "The Court," to use the words of Lord Cairns in *Pugh* v. *Heath* (1), "is now not a Court of law, or a Court of Equity, it is a *Court of Complete Jurisdiction*, and if there were a variance between what, before the Judicature Act, a Court of law and a Court of Equity would have done, the rule of the Court of Equity must now prevail." Where the plaintiff claims to be entitled to any right—such as here, the right of possession of land—by virtue of an equitable estate, the High Court, whatever may be the Division of it in which the suit may happen to be, *must*, so long as the suit remains in the Division, give the same relief as ought to have been given by the Court of Chancery in a suit properly instituted for the like purpose before the Act. This is one of the broadest of the principles which are the bases of the Judicature Act, and we cannot allow it to be frittered away by small technicalities, which it was one of the objects of the Act to extinguish.

From this principle results that which Sir George Jessel (whose loss is greatly to be deplored by all who desire that a wide and liberal interpretation shall be given to the Act), in *The General Finance Co.* v. *Liberator Benefit Building Society* (2), treats as settled law that no action of ejectment can be defeated for the want of the legal estate where the plaintiff has a title to the possession. To my mind that proposition is absolutely incontestable. We have been referred to *Allen* v. *Woods* (3), in which Lindley, L.J., held that in the peculiar circumstances of the case before him the person who had the legal estate should have been a party to the

(1) 7 A. C. 237. (2) 10 Ch. D. 15, 24. (3) 68 L. T. 143.

suit, and in which he refused relief in his absence. The observations of that very learned Judge, which of course must be taken *secundum subjectam materiam*, seem to have been erroneously incorporated in some of the later text-books, and there treated as laying down the *general* proposition that no one who claims an equitable estate can have any relief unless the legal estate is before the Court. The learned Lord Justice could not have meant to enunciate, and, as I read his judgment, did not in fact enunciate, any such general proposition. The case was one in which the plaintiff could not have succeeded unless direct relief had been given against the absent person. It was essential to that success that such person should have been a trustee for the plaintiff, and as he was not an express trustee, or a person who could be deemed a trustee otherwise than through the judgment of the Court, it was a condition precedent to giving any relief to the plaintiff that the judgment should declare him a trustee—a judgment which it was impossible to give when he was not a party. I therefore pass by that case, and come to the facts of the present one.

It is impossible to contend that the Land Commission are entitled, under the conveyance to them, to go into possession, unless and until default has been made in payment of an instalment. Mr. Bartley referred to cases in which mortgagees were held entitled at law to go into possession before default. But the question discussed in those cases was whether the words of the particular mortgage there under consideration had the precision necessary to amount to a demise of the mortgaged premises by the mortgagee to the mortgagor until default. Words operating by way of covenant only were not *at law* sufficient for that purpose, no matter how clear might have been the intention: *Doe* v. *Lightfoot* (1); although I think it clear that if the intention that the mortgagor should retain possession till default were manifest on the face of the mortgage, the mortgagee, if he tried to enter before default, would have been restrained by a Court of Equity from so doing. If that be so in the case of an ordinary mortgage, *a fortiori* is it in a case like the present, where the mortgage is to a body like the Land Commission, created by statute for the purpose of carrying out the purchase provisions of a series of Acts,

(1) 8 M. & W. 564.

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the whole object of which would be defeated if the tenant-purchaser's possession could be interfered with so long as he performed his contract with the State.

These Acts were passed for the benefit of occupying tenants, with the object of continuing them in their occupation, not as tenants but as fee-simple proprietors, and as ancillary to this object of inducing them to purchase the fee-simple of their holdings by making them advances of money repayable by instalments. The deed to the Land Commission is prepared not inaptly to carry out the intention of the Acts, but even had it not been, I should not have had any hesitation in holding that, before the Judicature Act, a Court of Equity would at once have restrained the Land Commission in the almost impossible event of their attempting to use their legal estate to dispossess a purchaser before default—a use which would have been in defiance of the plain terms of the Acts.

If that is so, what is the condition of the parties here? The legal estate is vested in the Land Commission, whose right to punctual payment of the instalments is superior to that of all the parties here. Then, subject to that right, the two parties here are, first, Houston (who is represented by the plaintiffs), a purchaser under a power of sale in the mortgage, who claims the possession under his contract of sale (a contract admittedly binding on the defendant, the mortgagor); and, secondly, the mortgagor himself, who resists the right to possession of the plaintiff, a person plainly entitled to that possession not only against him, but against everyone, including the Land Commission. Is it possible to contend that it is not inequitable that the mortgagor should rely on that legal estate to prejudice the title conferred on the purchaser through his own grant? I hold that, even had there not been a purchaser, the second mortgagees, the Antrim Land Company, could recover in this ejectment. But here there is a purchaser, and *his* right is not to an account of the sum due on the mortgage, or to a receiver, or to a sale. His contract is one of purchase. It is one which is capable of being, and which he is entitled to have, specifically performed, and of that specific performance possession is part and parcel. It follows that the plaintiffs are entitled to the possession; and, in the words of Sir George

Jessel, "the action cannot be defeated for the want of the legal estate."

This being so, it would serve no useful purpose were I to discuss the exact form of procedure which, before the Judicature Act, ought to have been adopted by a Court of Equity as ancillary to determining the plaintiff's right of possession. It is immaterial whether it would have restrained the defendant from relying on the outstanding legal estate, treating it as a temporary bar (as was done in *Blennerhassett* v. *Day* (1)), and let the question be tried in an ejectment; or whether an issue would have been directed; or whether the Court of Chancery itself would have determined the right of possession; or, lastly, whether the outstanding estate was such a temporary bar as might have been dealt with under the Common Law Procedure Act of 1856. Whatever might have been the course adopted, one thing is certain, that through the judgments of two separate Courts the plaintiff would have been put into possession, and what then could have been effected through two Courts can and ought now to be effected by the one Court.

Mr. Bartley's argument ultimately assumed the form of an objection for want of parties. He contended that nothing could be done in the absence of the Land Commission. I deem it essential to the ends of justice that the Court should lend no colour to an objection for want of parties, unless there be solid, indeed coercive, reason for so doing. So far back as 1843, Sir E. Sugden began the struggle against the enormous costs incurred by the number of parties rendered necessary by the former Rules of Courts of Equity. These Rules were, from time to time, abrogated and further abrogated, until the culmination was reached in our practice under the Judicature Act by Order XVI., Rule 11, of the Rules of 1891.

Under this Rule we are, in the circumstances of this case, enabled, and in my opinion bound, to determine the rights of the parties before us—parties indeed who represent the only rights and interests in dispute. The Land Commission are not interested in the action, or in any question raised in it. They have their paramount claim, no matter which party shall succeed here. It

(1) 2 B. & B. 104.

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would be a mere waste of time and money to direct that the case should stand over till the Land Commission were made parties.

I have already indicated that were it necessary to consider how the case would have stood had there not been a purchaser, and if the second mortgagees had been the sole plaintiffs, I should still have been of opinion that they were entitled to be put into possession. The old rule that partial relief should not be given has been abrogated, and I hold that in such a case as that supposed the mortgagee, although he had a power to sell, would be entitled to decline to exercise it, without actual possession; so that he might be in a position when selling to guarantee to the purchaser possession on a fixed day. It is no answer to this to say that he could get an order for sale in the Chancery Division. His contract is that he is to have a power of sale, and the Court ought not to deprive him of that power. Nor is it an answer that the purchaser after completion might himself bring an ejectment. Many a person may be willing to purchase a farm under a contract that he will obtain possession on a fixed day without litigation, and quite unwilling to purchase if his right to possession must be established by an action. The necessity of the purchaser entering upon litigation would undoubedly seriously affect the price.

On these grounds I am of opinion that the order of the King's Bench should be reversed.

FITZ GIBBON, L.J.:—

I doubt that the King's Bench can have been conscious of the consequences of its decision in this case. If this action be defeated, it is the defeat of the claim of a mortgagee of a holding acquired under the Land Purchase Acts, and the decision, as it stands, is a decision that no mortgagee of property of that description—a large and increasing class in this country—can enforce payment of his demand by recovering possession of the mortgaged land.

The deed executed under the Purchase Acts first vests the fee-simple in the purchasing tenant, and then transfers it to the Land Commission as security for the payment by instalments of the principal and interest of the purchase-money. It is immaterial

that the Land Commission is a public body; the effect of the deed must be the same as if the parties to it were private individuals.

It will throw light on the question to consider the case in three different aspects.

First, what would the rights of the parties have been at Common Law, before the Judicature Act? In an ejectment at law brought by a second mortgagee, being the owner of an equitable estate in the land, the mortgagor could not set up the existence of a prior legal mortgage as a defence against the claim of his own equitable grantee to the possession.

It has been contended that this rule could not apply to this case, because the existence of the first mortgage was disclosed on the face of the second. I cannot conceive how that can be so. The disclosure of the first mortgage on the deed could not have any greater effect than if the puisne mortgagee had express notice of it in any other way. Further, no honestly or properly drawn puisne mortgage could omit to disclose on its face that the lands were subject to a prior mortgage, as the omission might facilitate fraud by enabling the equitable mortgagee to represent himself as the legal owner of the fee, or by making the deed appear to convey the legal estate.

In my opinion, the only distinction which is material for the present purpose is where the second security created only a charge, and gave no equitable estate in the land or equitable right to the possession. Under the old law, the test of the right of a mortgagee, whether puisne or not, to obtain possession of the land, was whether he had the right to foreclose. In Ireland, foreclosure fell into disuse, because there was here a special procedure for realizing mortgages by Court Receivers, and by sales in the Landed Estates Court; but puisne mortgagees had the same right of foreclosure as in England.

In Davidson's Conveyancing (vol. ii., p. 69, 4th ed.) the law is stated thus:—

> "The question whether the strict right of an equitable mortgagee is foreclosure or sale has been much discussed. Some confusion seems to have been created by not properly distinguishing between, first, a formal mortgage of an equity of redemption; secondly, a mortgage created by deposit of deeds with an express agreement to execute a

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formal mortgage; thirdly, a mortgage by deposit without such an agreement, as to which, after conflict of authority, it has been determined that the effect of the deposit alone is to give the mortgagee the right to call for a formal mortgage, so that this case is not distinguishable in principle from the last case; and, fourthly, an equitable security which gives a mere charge or lien on the property without any right to call for a formal mortgage. It appears to be settled that the right of the mortgagee in both the first, and the second, and the third cases is foreclosure, and in the fourth case sale only; but that in the case of a mortgage by deposit the mortgagee can waive his right to foreclosure, and obtain an immediate decree for sale."

If that is the law, under a puisne mortgage, such as we have here, which in equity granted the land and the right to possession, the mortgagor could not set up the prior legal mortgage as a defence to a simple ejectment on the title at law.

But whether I am right or wrong in that, I have still to consider, secondly, what would have been the rights of the parties before the Judicature Act, if the puisne mortgagee had either aided his ejectment by an order of a Court of Equity, or had proceeded by suit in Equity. In either case it is, in my opinion, clear that possession of the land could have been recovered. If the ejectment had been brought at law, the order which would have been made by a Court of Equity in aid of that action would have been a decree prohibiting temporary bars from being set up so as to prevent the real right to the property—*i.e.* to the possession claimed in the action—from being tried and determined. If a suit in Equity had been brought before the Judicature Act, by the present plaintiff against the present defendant, and the defendant had pleaded that the legal estate was in the Land Commission, the one and only thing which a Court of Equity would have done would have been to order notice to be given to the Land Commission as owner of the legal estate. If the Land Commission came in, the Court, on ascertaining that it had the legal right, would inquire whether it desired to go into possession. If not, the equitable mortgagee might have obtained the possession, or had a Receiver, in either case keeping down the charge of the Land Commission.

Seeing that the vesting of the legal estate in the Land Commission is simply part of a system created by statute, for fixing occupying tenants of land in Ireland in their holdings, while

securing payment of the purchase-money advanced by the State by instalments covering a long period of years, it would seem to me to be illegal for the Land Commission to put the tenant out, or to go itself into possession, until default in payment of some instalment; and even if the tenant was in default, the Land Commission, when brought before the Court of Equity, on notice, in a suit by the equitable mortgagee, might say, "We do not want to go into possession," or the Court might say, "The plaintiff must indemnify the Land Commission"—in other words, he must redeem, or pay the instalments due. In neither case could the mortgagor defeat the claim of the equitable mortgagee to the possession, as the King's Bench has defeated it here.

Lastly, if the action could not have been defeated under the old law, whether at Common Law, or in Equity, or by combining both, there can be no answer to the suit since the Judicature Act. If the defence be treated as an objection for want of parties, the rule requires us to dispose of the case as between the parties before us, unless it is necessary to bring in others in order to provide for their rights. If the defence be treated as a plea in bar, or as matter of substance, then we must obey the Act by giving the same relief which a Court of Equity would have given before—that is, an equitable decree to put the plaintiff into possession, on providing for the payment of the instalments to the Land Commission.

For these reasons I concur with the other members of the Court in holding that the judgment of the King's Bench must be reversed, and that the judgment of Kenny, J., for the possession must be restored.

HOLMES, L.J.:—

I start with the proposition that, since the Judicature Act, where a person is entitled in equity to the possession of land, he can recover such possession by action in the High Court, even although the legal estate is not vested in him. This seems to me to follow from the language of the Act, and it has been laid down by high judicial authority. If I am right in this, the only question is whether the plaintiffs or either of them are entitled in equity to the possession of the premises sued for. What are the relations

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of the several parties to each other? An occupying tenant purchased his holding from his landlord, borrowing the purchase-money from the Land Commission in the manner prescribed by Lord Ashbourne's Act, which provides that the loan is to be repaid by a terminable annuity to be secured by deed. This security was given in a way afterwards abandoned as inconvenient, namely, by a tripartite instrument, by which the landlord first conveyed the lands to the tenant, and the latter then mortgaged them to the Land Commission to secure the payment of the annuity at the times agreed on. It is manifest that although the legal estate was then vested in the Land Commission, that body was not entitled to take possession of the premises as long as the annuity was not in arrear. Even if the terms of the deed expressly authorized such a step, I should hold the provision to be illegal as being repugnant to the Act of Parliament that authorized the loan and the security; but there is no stipulation of this kind, nor any difficulty in ascertaining the true construction of the document. In this state of things the tenant, who had purchased, mortgaged the lands to the Investment Company. The mortgage deed conveys the premises in fee-simple, and contains a reference to the instrument under which the mortgagor had acquired them, and by which he had vested them in the Land Commission. The mortgagee had thus notice of the terms of that deed, and the effect of the mortgage was to convey to him, subject thereto, all the mortgagor's interest in the lands, including the right to retain possession as long as the annuity was duly paid. The Conveyancing Act attached to the mortgage a power of sale; and the Company subsequently sold to the other plaintiff under circumstances and in a manner which have been held in a former action to have constituted a proper exercise of the power.

The vendor and purchaser seek in the present suit to recover possession from the mortgagor. Why are they not to succeed? I do not understand that the objection of the outstanding legal estate is relied on; but if it is, I have already dealt with it. Mr. Bartley, however, argues that as the Land Commission is entitled at any moment to enter into possession of the premises, the plaintiffs have failed to establish the right which is the foundation of the action. I have pointed out that this is a mistake. As long as

the annuity is duly paid, the Land Commission cannot interfere with the possession, and I must assume, in the absence of evidence to the contrary, that the annuity is not in arrear. It was for the defendants, who are relying as against the mortgagee on the security given to the Land Commission, to show that, according to the terms of that instrument, the latter are now entitled to possession.

Mr. Bartley, feeling the force of this proposition, had recourse to an objection for want of parties, and I think I am doing him no injustice in saying that he admitted that if the Land Commission had been named as defendants, and if they had not claimed possession, the plaintiffs would have been entitled to judgment. But as the law now stands the misjoinder is not necessarily fatal. If this objection had been taken at the trial—and in the defendants' favour, I deal with the case as if it had been—the Judge, as he is authorized to do by the Judicature Rules, ought to, and I doubt not would, have proceeded to adjudicate on the rights of the parties before him, knowing that the Land Commission would not be affected by his judgment.

If that body has now, or will have hereafter, a right of entry, nothing that is done in this suit can interfere with it. It would be most dangerous to give any countenance to the idea that, where controversies arise as to the possession of premises purchased under the provisions of the Land Purchase Acts, the Land Commission are necessary parties by reason of the annuity charged on the holding.

It will be observed that in giving my reasons for allowing the appeal, I have confined myself to the facts of this action. I have not ventured upon the wider considerations which Fitz-Gibbon, L.J., has referred to, and which are, in my opinion, not free from difficulty. Deeds precisely or substantially similar to the present must be of frequent occurrence in Ireland; and I desire to rest my judgment upon grounds which to my mind are unanswerable, and are at the same time quite independent of the right of the ordinary puisne mortgagee to obtain possession of the mortgaged premises from his mortgagor.

Solicitors for the plaintiffs: *A. Caruth & Son.*

Solicitor for the defendants: *J. A. M'Lernon.* R. D. M.

K. B. Div. 1904. Jan. 20, 21. Feb. 10.

THE KING (SCOTTISH PROVIDENT INSTITUTION AND E. G. MACGEORGE) *v.* THE RECORDER OF BELFAST AND THE LORD MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF BELFAST (1).

Belfast municipal rates—Rateable property—Separate apartments—Owner—Occupier—Liability to rates—Quarter Sessions—Rating appeal—Estoppel—Belfast Improvement Act, 1845 (8 & 9 *Vict. c.* cxlii), *ss.* 348, 353, 369—1 & 2 *Vict. c.* 56, *s.* 107.

Under section 348 of the Belfast Improvement Act, 1845, the Belfast Corporation have power to make certain municipal rates upon the occupiers of houses, buildings, &c., within the limits of the Act, according to the annual value of the same. Section 353 enacts that all rateable property within the limits of the Act, the annual value whereof respectively shall not exceed £8, or which shall be let to weekly or monthly tenants, or in separate apartments, shall, for the purpose of rating under the Act, be considered as occupied by the owners thereof, and every such owner shall be rated to and pay the rates directed to be made by the Act.

The prosecutors had erected on a plot of ground within the limits of the Act, held by them in fee-simple, a building five stories high. Part of the ground floor was occupied by them as their own offices, and the remainder of the ground floor was used for shops, the offices and shops having each a separate entrance from the street. The remainder of the building, consisting of the first, second, third, and fourth floors, was let by the prosecutors in separate, self-contained suites of offices, having a common entrance from the street, the tenants in each case holding under tenancies greater than monthly. Each suite was separately valued under the General Valuation (Ireland) Act, 1852, the valuation in each case exceeding £8 :—

Held, that the prosecutors, and not the tenants of the offices, were liable to be rated to and to pay the municipal rates in respect of the suites of offices on the first, second, third, and fourth floors.

The Belfast Improvement Act, 1845, gives an appeal to Quarter Sessions against any rate made under the Act, and gives the Quarter Sessions Court the same powers of amending or quashing such rate as in an appeal against poor rates, in which latter case the order on appeal is by the 107th section of the Irish Poor Relief Act, 1838, made "final and conclusive on all parties."

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and WRIGHT, JJ.

The prosecutors in the present case, having been assessed by the Belfast Corporation for the municipal rates in respect of the building in question, appealed to the Quarter Sessions, and an order was there made, "that said appeal be refused with costs," not stating the grounds of refusal:—

Held, that if the rates had been invalid, the order of the Quarter Sessions would not have prevented the prosecutors from impeaching them on *certiorari*.

CERTIORARI.

The facts and the nature of the arguments sufficiently appear from the head note and the judgment of Andrews, J.

Gordon, K.C., and *Bates, K.C.* (with them *Raphael*), for the Scottish Provident Institution.

Ronan, K.C., and *Overend*, for the Belfast Corporation.

Hume, K.C., and *R. C. K. Wilson* (with them *J. Whitaker*), for Messrs. Wheeler and M'Cutcheon.

The following authorities were cited in addition to those mentioned in the judgment: *The Queen* v. *Commissioner of Valuation and Great Southern Railway Company* (1); *Overseers of the Poor of Walsall* v. *London and North Western Railway Company* (2); *The Queen* (*M'Evoy*) v. *Corporation of Dublin* (3); *The King* (*Roe*) v. *The Justices of County Roscommon* (*Prenty's case*) (4).

Cur. adv. vult.

Feb. 10.

LORD O'BRIEN, L.C.J.:—

My brother Andrews will deliver the judgment of the Court.

ANDREWS, J.:—

This case came before us on a motion by the prosecutors to make absolute a conditional order of the 3rd of December last, for a writ of *certiorari* to bring up to be quashed—(1) the municipal rates made and assessed on the 1st of April last on the Scottish Provident Institution in respect of the offices, rooms, and premises on the 1st, 2nd, 3rd, and 4th floors of the block of buildings in

(1) [1901] 2 I. R. 215.
(2) 4 A. C. 30, at p. 39.
(3) 2 L. R. Ir. 371.
(4) 37 I. L. T. R. 252.

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Wellington-place, and Donegall-square West, Belfast; (2) the resolution by the Council of the Borough of Belfast, of the 1st of April last, for the amendment of the rates made in the years 1900, 1901, and 1902, by inserting the name of the Scottish Provident Institution in the rate books in respect of the said premises, and the amendments made accordingly; and (3) the order of the Recorder of Belfast, made at the Quarter Sessions held there on the 15th of June last, refusing the appeal of the said Institution against the said rates. The material facts disclosed by the affidavits used on the motion are the following:—In 1896 the said Institution purchased in fee-simple in possession a plot of ground at the corner of Donegall-square, and Wellington-place, Belfast, on which they proceeded to erect the large building, known as the Scottish Provident Buildings, five stories high. Part of the ground floor is occupied by the Institution as their own offices, and the remainder of the ground floor is used for shops, these offices and shops having each a separate entrance from the street. The remainder of the building, consisting of the 1st, 2nd, 3rd, and 4th floors, is let by the Institution in separate, self-contained suites of offices, having a common entrance from the street. On the second floor Messrs. Wheeler and M'Cutcheon hold and occupy, under a lease from the Institution of the 1st of May, 1900, a separate suite of offices, with strong rooms, lavatory, and water closets, approached by a double swing door opening off the landing of the common staircase.

In the case of *Wheeler and M'Cutcheon* v. *The Commissioner of Valuation* (1), which was argued in this Court, in June, 1901, it was pointed out that the structure of the block called the Scottish Provident Buildings in Belfast, and the letting and user of Wheeler and M'Cutcheon's suite of offices (which, so far as is material for this case, are similar to the letting and user of each of the other suites of offices in the block), were substantially the same as those which were under consideration in the case of *The Queen* v. *St. George's Union* (2), in which it was held that each set of rooms in the Westminster Chambers was separately occupied by each tenant, and ought to be separately inserted and assessed in the

(1) 2 New Ir. Jurist, 17. (2) L. R. 7 Q. B. 90.

valuation list under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67); and this Court, having regard to that case and the case of *Switzer and Company* v. *The Commissioner of Valuation* (1), held that Wheeler and M'Cutcheon's suite of offices ought to be separately valued under the General Valuation (Ireland) Act, 1852 (15 & 16 Vict. c. 63), but expressly abstained from giving any decision on the question whether Wheeler and M'Cutcheon were rateable in respect of their suite of offices, which the Court held was not before it for determination. Each separate suite of offices in the block has accordingly been separately valued, and prior to April, 1902, the several tenants of these offices were rated and assessed in respect of them, and all the tenants except Wheeler and M'Cutcheon paid the rates; but Wheeler and M'Cutcheon refused to pay, and when, on the 1st of April, 1902, they were rated in respect of their offices to the municipal rates leviable in Belfast, they appealed against this rating to the Recorder. The rates in question were made under the authority of the Belfast Improvement Act, 1845 (8 & 9 Vict. c. cxlii.), and subsequent Acts, which made the Act of 1845 applicable for rating purposes to the rates they authorized, and the appeal was brought under the 367th section of the Act of 1845. The ground of the appeal was that under the 353rd section of the Act of 1845, the Scottish Provident Institution, as owners of the block of buildings, were liable to be rated to and to pay the rates in question; and the construction of that section was the main question argued before us, and on which the decision of this Court was sought to be obtained. The Recorder, on the 22nd of May, 1902, allowed the appeal (2), and acting on this decision the Scottish Provident Institution was assessed in the rate books for 1903, for the municipal rates leviable under the authority of the Act of 1845, and the Council of the Borough of Belfast, in exercise of the power conferred on them by the 362nd section of the Act of 1845, passed a resolution for the amendment of the rate books for the years 1900, 1901, and 1902, by inserting the name of the Scottish Provident Institution as owners of the block of buildings in question, so as to render them liable to the municipal rates for those years;

(1) [1902] 2 I. R. 275.

(2) *Wheeler & M'Cutcheon* v. *Belfast Borough Council*, 36 I. L. T. 120.

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and the amendments were made accordingly. The Institution appealed to the Recorder, both against being so rated for 1903, and against the Council's resolution and the amendments made pursuant thereto. These appeals were separate, but appear to have been heard together, and on the 15th June, 1903, the Recorder made one order (which was taken as applying to both appeals) in these words, "that said appeal be refused with costs when taxed and ascertained." The next step was the obtaining by the Scottish Provident Institution of the conditional order now before us for the writ of *certiorari*.

By the 348th section of the Act of 1845, the Council of the Borough of Belfast are empowered to make the rates in question upon the occupiers of all houses, buildings, tenements, quays, wharfs, and other hereditaments within the limits of the Act, according to the annual value of the same. The 356th section enacted that the annual value of all property rateable under that Act should, if the Council should so determine, be ascertained according to the next preceding assessment thereof for the relief of the poor; and by the 358th section it was provided that if such assessment should, in the judgment of the Council, be an unfair criterion, it should be lawful for them to cause a valuation to be made of the rateable property within the limits of the Act as therein mentioned. The block of the Scottish Provident Institution's buildings is therefore clearly rateable property within the limits of the Act, and this block, if in the occupation of its owners, and not let out in separate suites of offices, would, as held separately by its owners under one and the same title, be obviously a unit of rateable property capable of being, and proper to be, separately valued and rated as a whole.

I now come to the 353rd section of the Act of 1845, which, as applicable to the block of buildings in question and the facts of this case, reads thus: "All rateable property within the limits of this Act . . . . which shall be let . . . in separate apartments shall, for the purpose of rating under this Act, be considered as occupied by the owners thereof, and every such owner shall be rated to and pay the rates by this Act directed to be made." Now the fact that the separate suites of offices are separately valued under the General Valuation Act of 1852, cannot, in my opinion, control or

affect the construction or force of the 353rd section of the Act of 1845. No doubt once it is determined, as it has been, that each suite of offices must be separately valued under the Act of 1852 (the valuation under which must now be used for all public and local assessments and other rating), the rates in question must be struck in respect of each separate suite so separately valued. They cannot be struck upon the block as a whole, for there is no valuation of it as a whole on which to strike them. If this block of buildings had existed in 1845, the Borough Council, as the law then stood, could apparently have procured a valuation of the whole block, on which the rates in question could have been struck, notwithstanding the separate lettings; but whether this could have been done then or not, it is now settled that under the Act of 1852 the separate suites held under separate lettings must be separately valued. This cannot, however, in my opinion, affect or alter the liability to pay the rates, which must be determined upon the construction of the 353rd section as the law stood in 1845, and I have been unable to come to any other conclusion than that this section applies to the block of buildings in question, let as it has been. I think it is in itself capable of being a unit both of valuation and rating; that it is "rateable property" within the meaning of the 353rd section; and that as regards the four floors in question it is "let in separate apartments" within the meaning of that section; and that it therefore follows that the Scottish Provident Institution, as owners thereof, are, under the express terms of the 353rd section, to be considered as occupiers who are to be rated to the rates in question, and by whom they are to be paid. No point has been made with reference to the ground floor of the block, nor has any question been raised in relation to it. Part of it is in the actual occupation of the Institution, and the remainder, which is used as shops, with separate entrances, is presumably, either by separate lettings or otherwise, within the 353rd section. During the argument counsel for Wheeler and M'Cutcheon (who opposed the motion to make the conditional order absolute) pointedly drew attention to the fact that under the 353rd section the owners, and not the occupiers, of rateable property are liable to the rates in two other classes of cases, namely, where the annual value of the rateable property does not exceed £8, and where the

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rateable property is let to weekly or monthly tenants, and he asked if the block of buildings in question was let to weekly or monthly tenants, could it be contended that, notwithstanding the 353rd section, the occupiers were liable to the rates, and that the owners were not; and, if such a contention could not prevail in that case, how could the liability of the occupiers be contended for in the present case? I heard no satisfactory answer to these questions. It seems to me to be plain that in each of the three classes of cases within the 353rd section the liability to the rates is transferred from the occupiers to, and imposed on, the owners.

On behalf of the prosecutors reliance was placed on the 4th section of the Irish Poor Law Amendment Act, 1843 (6 & 7 Vict. c. 92), which was in force when the Act of 1845 was passed. That section had reference to poor rate, with which we are not concerned in the present case, and as regards the liability to which I abstain from offering any opinion; but that 4th section enacted "that where any house is let in separate apartments or lodgings, no tenant of any such apartment or lodging shall be liable to be rated in respect thereof, but the rate shall be made in respect of the whole of such house upon the immediate lessor under whom such apartments or lodgings are held." . . . "Provided always that nothing herein contained shall prevent the separate valuation and rating of such portions of a tenement as are held separately from the remainder, and to which there is an exclusive right of ingress." If, as was suggested, the framers of the Act of 1845 had that section before them, the absence from the 353rd section of any such proviso as the 4th section of the Act of 1843 contains would appear to me to strongly support the contention that in the present case the owners, and not the occupiers, are liable to the rates under the Act of 1845. As I have already said, however, the question of liability to poor rate is not before us. It may possibly be raised hereafter, and I offer no opinion upon it, nor on the question whether, on the facts of this case, there is "an exclusive right of ingress," within the meaning of the 4th section of the Act of 1843, into the portions of the block of buildings in question which are separately let; but even assuming that this section is applicable to them as regards poor rate, I can neither follow nor accept the

argument that therefore the occupiers, and not the owners, of the block are liable to the wholly different rates under the Act of 1845, notwithstanding the exemption in the 353rd section, without any such qualifying proviso as is contained in the 4th section of the Act of 1843; nor can I adopt Mr. Bates's contention that the block of buildings (which, as I think, clearly comes within the words "rateable property" in the 353rd section) is not within that section, which, as he argued, is, in the case of a house or building, only applicable to a house or building let in separate apartments to which there is not an exclusive right of ingress. I hold this block of buildings to be within the 353rd section, because it clearly belongs to a class of the rateable property as specified in the 348th section, and because it is separately held by its owners under one and the same title, and therefore in itself was and is, if it were occupied by them, a unit capable of being both separately valued and rated. Mr. Ronan, on behalf of the Borough Council (whose only desire is to have the question of liability determined), suggested that there might be a difficulty in our way in giving any decision in this case, having regard to the order of the Recorder of the 15th June, 1903 (already referred to), refusing the Scottish Provident Institution's appeal to his Court. Mr. Ronan pointed out that this appeal was brought under the 367th section of the Act of 1845, and although he said that it was not alleged that the Institution was in any way estopped by conduct, still he referred to the 369th section of the Act of 1845, which gave the Court of Quarter Sessions, in any appeal against any rate made under that Act, the same powers of amending or quashing such rate as it had for amending or quashing the rates for the relief of the poor upon appeals against such rates; and he submitted that, having regard to the 107th section of the Irish Poor Relief Act, 1838 (1 & 2 Vict. c. 56), the order on such appeal would appear to be "final and conclusive upon all parties." I do not think, whatever the construction of these sections may be, that the Recorder's order of the 15th June, 1903, refusing the appeal, deprived this Court of jurisdiction to entertain and decide the present case. It was merely a negative order, and stated no more than that the appeal was refused. So far as the order itself shows, the refusal might not have involved a decision on the question of liability argued before us, and I do not

K. B. Div. 1904.

THE KING (SCOTTISH PROV. INST.) v. RECORDER & LD. MAYOR, &c., BELFAST

Andrews, J.

think it could be at the farthest conclusive of more than that the appeal was refused on some ground not stated, and if this Court had, in the exercise of its undoubted jurisdiction over rates, quashed the rates which the prosecutors have impeached, as invalid, I think the Recorder's order would, without more, have fallen with the rates, and could not have been in any way relied on as rendering them unimpeachable on *certiorari*. According to my view, however, the impeached rates are not invalid, and the Recorder's order is a good one, if it is to be taken as applicable to both the appeals, which he heard together. The result is that the motion to make the conditional order absolute should be refused, and the conditional order should be discharged without costs; and with reference to various hypothetical cases which were put during the argument by Mr. Bates, I have only to add that the decision in this case will not necessarily govern any other case of the kind in which the facts may be different, either as regards the circumstances and character of the "rateable property," to which the 353rd section may be sought to be applied, or otherwise.

Solicitor for the prosecutors: *W. V. Davidson.*

Solicitor for the Belfast Corporation: *Sir Samuel Black.*

Solicitors for Messrs. Wheeler and M'Cutcheon: *Wheeler and M'Cutcheon in person.*

J. G. T.

M'QUADE *v.* CHARLTON (1).

Appeal.
1902.
Nov. 10.

Parliament—Franchise—Service franchise—Inhabitant occupier—Separate bedroom—Dwelling-house—48 Vict. c. 3, s. 3.

The claimant was, along with several other men, in the employment of a Company which carried on an extensive drapery business in Belfast. His contract was to be paid a yearly salary, to be boarded by the Company, and to have a bedroom so long as he remained in their service, the service being determinable on notice. There was a bolt inside to fasten the door, but the claimant had not the key. The manager could change an employee from one bedroom to another, if necessary. There were rules, understood in the house, regulating the occupation of bedrooms; that the claimant could not leave his business in the shop to go there without permission; that on Saturday the bedrooms were closed up to 2 p.m. for cleaning. There was no printed rule preventing an assistant being in his bedroom between 11 a.m. and 1 p.m. on Sunday, but there was an understanding to that effect, and if an employee violated this understanding, the superintendent would consider it his duty to correct him:—

Held, that the claimant was not entitled to the franchise.

Stribling v. *Halse* (16 Q. B. D. 246) discussed.

THIS was an appeal from the decision of Mr. John Patchell, Revising Barrister for Belfast, West, admitting the claim of Samuel W. Charlton as an inhabitant occupier of apartments on the 6th floor of the Bank Buildings, Castle-place, Belfast.

The facts were as follows:—The claimant was an employee of the firm of Robertson, Ledlie, Ferguson, & Company, which carries on a very extensive drapery business in the premises known as the Bank Buildings, Belfast. He was employed on behalf of the Company by a manager, Mr. Morrison. In employing him the manager contracted that he was to be paid a certain yearly salary; that he was to be boarded by the Company, and to have a bedroom of his own so long as he remained in the service of the Company, and that such service was determinable on certain

(1) Before LORD O'BRIEN, L.C.J., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1902. M'QUADE v. CHARLTON.

notice. The manager referred him to a superintendent, who handed him a card having printed on it the number of the bedroom he was to occupy, and the hours appointed for meals. He had occupied that bedroom ever since, and that was for five years. No other employee ever at any time occupied it or had anything to do with it. None of his employers lived in the house.

On cross-examination he stated that he was not told he was to have that bedroom exclusively. The word exclusive was not used by the manager or superintendent; he was simply to have a bedroom so long as he remained in the Company's service, and his bedroom contained but one bed, a single bed; he had not a key for the room. There was a bolt inside, by which the door could be kept fastened. The manager could change an employee from one bedroom to another, if necessary. Neither he, nor any of the employees scheduled, had ever been changed. There were certain rules, understood in the house by all the employees, regulating a man's occupation of his bedroom. One was that an employee could not leave his business in the shop and go to his bedroom without special permission; and on Saturday the bedrooms of all the employees were supposed to be closed up to 2 p.m. for domestic purposes. This was an understood arrangement in the house, to enable the rooms to be cleaned. The employees leave their work at different times in the morning as their work demands. There was no written contract or document of any kind under which the said rooms were held by the employees. The bedrooms were separate and distinct from each other. There was no printed rule preventing an assistant being in his bedroom between 11 a.m. and 1 p.m. on Sunday; there was an understanding, however, to this effect. He was now a superintendent. If any employee violated this understanding, he would consider it his duty to correct him. The domestic work of the house was done by servants in the employment of the Company.

The Revising Barrister held that the claimant had the exclusive use of his bedroom by virtue of his employment, that the bedroom he occupied, he occupied as his dwelling-house, that no person under whom claimant served in his employment inhabited said dwelling-house, and he admitted him to the franchise.

Healy, K.C., and *T. J. Campbell*, for the appellant.

Gordon, K.C., *Chambers, K.C.*, and *Boyd*, for the respondent.

LORD O'BRIEN, L.C.J.:—

We are unanimously of opinion that the appeal should be allowed. Was this room the claimant's dwelling, or, in other words, was it his home? I use these words as convertible terms. The test here is the same as that put by Lord Esher in *Clutterbuck* v. *Taylor* (1) (the cubicle case), where he asks—"Are these incidents consistent with the ordinary idea of a man's dwelling?" Are the facts in this case then consistent with the idea of the room being the claimant's home? That is the test which we applied in the Nun's case: *Bannon* v. *Hanrahan* (2). Now, there are four facts found in this case, which, when taken together, in my opinion, show that this room was not this man's dwelling, and are inconsistent with the idea of its being his home. First of all, he had no contractual right to this particular room for which he claims the franchise. Secondly, the manager of the establishment could change the claimant from one room to another, if necessary—that is to say, it depended on the discretion of the manager: he was to determine whether the necessity arose or not. That is a very important finding. Thirdly, the rules, as understood in the house by all the employees, regulating the occupation of the bedrooms—these are most important. Fourthly, the fact that although there is no printed rule preventing an assistant being in his bedroom between 11 a.m. and 1 p.m. on Sunday, there is an understanding to that effect; and if any employee violated this understanding, he would be subject to correction.

Putting all these facts together, the occupation of the room by the claimant was inconsistent with its being his home—it was only his sleeping-place, not his home. The appeal, therefore, should, in my opinion, be allowed.

But *Stribling* v. *Halse* (3) was relied upon on behalf of the claimant. That case was the decision of the Divisional Court

(1) [1896] 1 Q. B. 400. (2) [1900] 2 I. R. 455. (3) 16 Q. B. D. 246.

Appeal. 1902. M'QUADE v. CHARLTON. Lord O'Brien, L.C.J.

only. In *Hasson* v. *Chambers* (1), two of the Judges of this Court—the Master of the Rolls and Fitz Gibbon, L.J.—dissented from the decision in that case: the majority of the Court—May, C.J., Barry and Naish, L.JJ.—followed it for conformity only. In *Barnett* v. *Hickmott* (2) it is quite plain that Lord Russell and the other members of the Divisional Court did not approve of the decision. Lord Russell there says:—"As to *Stribling* v. *Halse* (3), I wish to say a word. It is stated in the judgment in *Stribling* v. *Halse* (3) that a doubt which had been expressed by the present Master of the Rolls (when Lord Justice) was removed by a decision of the Court of Appeal; but there is no reported case to this effect, as a rigorous search (made at my instance) has failed to discover any record of such a case. The doubt there referred to was whether a person could be said to occupy a bedroom separately as a dwelling-house, where he dwelt partly in the bedroom and partly in other rooms. I share this doubt, especially in a case in which other rooms for recreation, for meals, and other purposes are shared in common. I should not have referred to this case but for the facts—firstly, that the case which is said to have removed the doubt cannot be found; and, secondly, because in the Irish case of *Hasson* v. *Chambers* (1) two of the five learned Judges in the Court of Appeal expressly dissented from *Stribling* v. *Halse* (3), and the majority, while acquiescing in it, can hardly be said to have approved of it. Nor, in my opinion, is the doubt referred to removed by the 5th section of the 41 & 42 Vict. c. 26." Wills, J., there says:—"The case of *Stribling* v. *Halse* (3) has, I think, gone to the extreme length to which such cases can be carried, and cannot be considered as governing any case which goes beyond the facts of that case. It cannot, I think, be considered an altogether satisfactory decision after the Irish case of *Hasson* v. *Chambers* (1)." That is quite plain. It cannot be considered a satisfactory decision, for every Court where it came to be discussed found fault with it. It has been argued, however, that though the facts may be identical, it does not necessarily follow that the legal result is identical: that though the facts in this case and in *Stribling* v. *Halse* (3) may be practically the same, a different legal conclusion

(1) 18 L. R. Ir. 68. (2) [1895] 1 Q. B. 691. (3) 16 Q. B. D. 246.

may follow. Lord Halsbury's celebrated *dictum* in *Leathem* v. *Quinn* (1), which so surprised the legal world, was appealed to. Lord Halsbury, in giving judgment in the well-known case of *Leathem* v. *Quinn* (1), said—"A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all." Notwithstanding the very high authority of Lord Halsbury, I own to have great difficulty, and say so with profound deference, in subscribing to this much-canvassed proposition; however, taking the test I have adverted to, whether this room was the home of the claimant, all the facts taken together are, in my opinion, necessarily inconsistent with its being his dwelling-house or home.

FITZ GIBBON, L.J.:—

In my opinion there is no evidence upon the statements in this case to justify the finding, as a reasonable inference of fact, either that the claimant's bedroom was a "dwelling-house," or that it was "separately occupied as a dwelling," or that his occupation of it was "exclusive" in the legal sense essential to the franchise of an inhabitant occupier. The "rules understood in the house by all the employees, regulating a man's occupation of his bedroom," show that each room was a mere sleeping-place; that all the bedrooms were in one and the same "dwelling-house"; that the power of allocation and control, and consequently the legal possession, remained in the employers; and that the enforcement of these rules was inconsistent with *exclusive* occupation of each room by the man who slept in it. Though the rules were not printed, they were operative, and it was the duty of the superintendent to enforce them. These rules not only prevented the occupants from excluding other people, but prevented themselves from occupying the rooms at certain times, or from using them except under certain conditions.

(1) [1901] A. C. 495.

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WALKER, L.J. :—

I concur. There is no evidence in support of the finding that this was a "dwelling-house" within the meaning of the Act of Parliament. All that the claimant had got was the right to a sleeping-room, to be determined on from time to time by the manager under certain rules as to its occupation, all inconsistent with the sleeping-place or room being a dwelling; and the only ground on which the finding of the Revising Barrister was sought to be supported in the end was that the case is not distinguishable from *Stribling* v. *Halse* (1). We are not bound by that decision. Even in England it is a discredited decision, and we do not agree with it. I agree with the judgments of the Master of the Rolls and Lord Justice FitzGibbon in *Hasson* v. *Chambers* (2), and I consider myself perfectly free from the authority of *Stribling* v. *Halse* (1).

HOLMES, L.J. :—

The only difficulty I have felt in this case is to distinguish it from *Stribling* v. *Halse* (1). If that were a decision binding upon us I should feel bound to uphold the view taken by the Revising Barrister; but having regard to the subsequent history of the case, I think that the Court is not bound by it; and being free from it, I entirely agree with the view which has been most clearly expressed by the Lord Chief Justice—a view based upon this, that there is not a particle of evidence to show that there was an exclusive occupation of this particular room as a dwelling, or, in other words, as a home.

Solicitor for the appellant: *James L. M'Donnell.*
Solicitor for the respondent: *M. Wylie.*

R. D. M.

(1) 16 Q. B. D. 246. (2) 18 L. R. Ir. 68.

LADD *v.* O'TOOLE (1).

Appeal.
1903.
Nov. 9, 16, 17.

Parliament—Registration of voters—Religious educational Community—College bedroom constituting "dwelling-house"—Service franchise—Registration appeal—Jurisdiction of Court—Previous decision, how far binding.

Each teacher and lay brother in a College conducted by a religious Community had, as such, during the qualifying period, the exclusive use of a separate bedroom in the College, which was managed by a resident principal, under the supreme control of the Superior-General of the Community, who himself lived in Paris. In 1887, in revising the list of voters, the Revising Barrister held that the bedroom so occupied by each of the teachers in the College was a dwelling-house for the purpose of the franchise, and was inhabited by him by virtue of his office or employment as a teacher, and that the College was not (for such purpose) inhabited by any person under whom he served in such office or employment, and he accordingly admitted each of the teachers to the franchise. This decision was affirmed by the Court of Appeal in *Alexander* v. *Burke* (22 L. R. Ir. 443), the four members who constituted the Court feeling themselves bound by *Hasson* v. *Chambers* (18 L. R. Ir. 68) and *Stribling* v. *Halse* (16 Q. B. D. 246). In each subsequent year the names of these teachers appeared on the register, and were not objected to until the year 1903. In this year an objection was served on each teacher and lay brother, the ground of objection being that the room in respect of which the franchise was claimed was not a dwelling-house, and also that its occupant was not its owner or tenant. The Revising Barrister, having regard to the evidence, some of which was not given in the former case, and also having regard to *M'Quade* v. *Charlton* ([1904] 2 I. R. 383), stated that if he had considered himself at liberty so to hold, he would have found that in no case was the bedroom occupied by a member of the Community a dwelling-house occupied by him by virtue of his office or employment as a teacher or lay brother; but as *Alexander* v. *Burke* (22 L. R. Ir. 443) was a decision of the Court of Appeal in respect of the same institution, and, as to the teachers, in respect of the same voters, declaring them entitled to the franchise, he considered he was bound to retain the names on the register, but stated a case on the points raised for the Court of Appeal:—

Held, that the Court of Appeal had power to review, and, if necessary, refuse to follow, a decision of its own pronounced in a registration appeal, and

(1) Before LORD O'BRIEN, L.C.J., SIR A. M. PORTER, Bart., M.R., PALLES, C.B., and FITZGIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1903.

LADD v. O'TOOLE.

that, upon the evidence in the present case, there was nothing to show that the bedroom separately occupied by each of the voters was his dwelling-house, and that they were not entitled to the franchise.

Per Palles, C.B., Walker and Holmes, L.JJ.: The relation of employer and employed, or of master and servant, did not exist between the other members of the Community and the head of the Order.

Alexander v. *Burke* (22 L. R. Ir. 443), *Hasson* v. *Chambers* (18 L. R. Ir. 68), and *Stribling* v. *Halse* (16 Q. B. D. 246) not followed.

APPEAL from the decision of Mr. Ignatius J. O'Brien, K.C., one of the Assistant Revising Barristers for the county of Dublin.

The case stated was as follows:—

At a Court held by me at Blackrock, on 26th September, 1903, and following days, the name of the Rev. Hugh O'Toole, 173, and the names of those in the schedule hereto appeared on the register, and were duly objected to by Thomas Theodore Ladd. The Rev. Hugh O'Toole and those whose names are set out in the first part of the schedule were among those whose right to be registered was argued in the case of *Alexander* v. *Burke* (1); since the date of that case their names had appeared in the registers, and had not been objected to.

The objector by his solicitor, Mr. William V. Seddall, contended that the decision given by the Court of Appeal in 1887 must be taken in substance as overruled by recent cases, especially by *M'Quade* v. *Charlton* (2), when *Stribling* v. *Halse* (3) and *Hasson* v. *Chambers* (4), on which the judgment in the French College case largely turned, were unfavourably commented on by the Court.

General evidence in support of the objection was given in each case, and by consent the evidence in all was taken on the same day, 2nd October, 1903.

Additional facts to those in the reported case were proved. Where there was a material variance from the facts in the old case, or new facts were proved, I have included same within brackets.

No consent similar to that referred to in the former case, page 444 of the report, was given.

(1) 22 L. R. Ir. 443.
(2) *Ante*, p. 385.
(3) 16 Q. B. D. 246.
(4) 18 L. R. Ir. 68.

The following were the facts proved :—

The Rev. Hugh O'Toole and the others named in the first part of the schedule are members of the body called La Communauté du Saint Esprit. The French College, Blackrock, is conducted by a branch of this body. The Superior-General of the Community [le Pere le Roy] lives in Paris; he has control over all the members of the Community at Blackrock, including the president of the College [the Rev. John T. Murphy], and the others mentioned in the schedule. The Superior-General has power to remove any member of the Community [from the College to any other house of the Order].

Whenever any matter of importance arises concerning the property of the College at Blackrock, it is submitted to the Superior-General in Paris for his decision.

The College at Blackrock is an educational establishment, where students are prepared for commercial pursuits, for Intermediate examinations, and for Civil Service examinations. They pay for their tuition and other expenses. The Rev. Hugh O'Toole and those named in the first part of the schedule are teachers in the College. Those named in the second part of the schedule are lay brothers. All are members of the Community. There are also hired servants who reside in the College. [The lay brothers do not as a general rule teach, their duty being to look after the general internal management of the College, attending to the catering, and so forth ; but if required by the president, they are bound to give religious instruction and teach catechism to the servants, and sometimes to the pupils.]

All the inmates of the College are under the general supervision and control of the president [the Rev. John T. Murphy], who deals with any case of breach of discipline. An account is furnished by him at the beginning of each year to the Superior-General at Paris, of the profits and losses of the College at Blackrock during the preceding year. [The Rev. John Ebenrecht and the Rev. Jules Botrel are rated for the College premises. The Rev. Jules Botrel does not reside at the College, but the Rev. John Ebenrecht does. They are disqualified for registration, not being naturalized English subjects.] The College premises consist of one building, with internal communications throughout, called

Appeal. 1903.

LADD v. O'TOOLE.

the French College, with the grounds about it. The College grounds are bounded by a wall, in which there are two gates in charge of lay brothers. The gates are closed and locked at nights, but members of the Community can always obtain admission. [A member can also always go out, but if he went out very frequently he might be reprimanded by the president.] All members of the Community are expected to attend prayers at half-past eight o'clock in the evening, and any member who is absent is obliged to give some reason for his absence to the president. Each member of the Community has the exclusive use of a separate bedroom. The teachers, with the exception of [the Rev. Philip Shea], take their meals with the president. The lay brothers take their meals separately from the teachers. The Rev. Hugh O'Toole and each of those mentioned in the schedule had during the qualifying period occupied exclusively a bedroom in the building described as the French College. In the case of those in the first part of the schedule they had during the said period been teachers in said College, and second part had been lay brothers. None are subject to any legal incapacity. [This room is in each case allotted by the bursar under the direction of the president. If the president ordered a member to whom a room was allotted to leave the room and occupy another, the member would have the right of appealing from that order to the Provincial of the Community, who lives in Ireland, but not at the French College, and from him there is a right of appeal to the General. If the direction to leave the room be confirmed, the member must leave the room. The Provincial may be a person resident in the French College, but not necessarily. Meals are ordinarily taken by the members in the dining hall or refectory, except in cases of illness. If a member of the Community declines to take his meals in the refectory, or failed to retire to rest or rise at the hours fixed for that purpose in the College, the matter would be reported to the Provincial or General, and if he were not satisfied that there was good reason he would reprimand the member for his conduct. In the case of meals, if he ordered them to be served in his room, they would be so served until the decision of the Provincial or General was obtained; but if he disapproved, the meals could not be so served in future.]

[The income arising from the fees paid by students and received from other sources is received, and all disbursements necessary for the upkeep of the College and support of the residents made by the bursar, the Rev. John Ebenrecht. He acts as bursar for the Community.]

[None of the teachers or lay brothers are paid any salary; they are supported and maintained out of the income above mentioned for the services rendered as aforesaid.]

[The Society, of which the teachers and lay brothers are members, have houses and branches in every part of the world. The president is a member. On entering the Order each member may, if he think fit, give all or part of his private property to the Society; but in the latter case, according to the rule of the Community, he cannot employ for his own use the portion of his property not so given without the consent of the Superior-General. There are rules for regulating the government of the Society and the houses. Some are traditional, and not committed to writing. Others are written.]

These rules were not produced.

[In Blackrock College it is the duty of the Rev. Father Murphy to see that the rules are carried out, and he has the general management of the house. In some cases of breach of rule the matter would be reported to the president, but in serious matters the report would be made to the Provincial.]

[If guests are received at the College, they are entertained in the refectory or in the parlour; never in the room occupied by the member in respect of which the franchise is claimed. The furniture of the rooms is provided out of the general funds of the Community. The rooms are cleaned by the servants employed in the College. No member has any special servant. The meals for the pupils and members are ordered by the bursar. The College premises appear to be vested by deed in the Rev. John Ebenrecht and the Rev. Jules Botrel.] The solicitor for the objector asked for the production of this deed. I thought he was entitled to have it produced, and if asked for, that I should give a summons. It was consented between the solicitor for the objector and Mr. Kavanagh, who appeared for all those objected to, that the actual issuing of a summons might be dispensed with, and that the

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case might be dealt with as if one had been issued and served on those having custody of the deed to produce it.

I adjourned the hearing of the case until 8th October, when Mr. Kavanagh stated that the trustees declined to produce the deed. I accordingly had no evidence before me as to what the trusts of the deed were.

Having regard to the case of *M'Quade* v. *Charlton* (1), to the additional facts proved, and the non-production of the deed, I should have found, if I thought I was at liberty to do so, that in no case was the bedroom occupied by a member of the Community a dwelling-house inhabited by him by virtue of his office or employment as a teacher or lay brother ; but as there was a decision of the Court of Appeal in respect of the same institution, and, as to the teachers, in respect of the same gentlemen, which had not been expressly overruled, I considered I should not be justified in disregarding it, and I accordingly retained the names of the Rev. Hugh O'Toole and the others named in the schedule. If I was wrong, all these names should be expunged from the register at the number indicated in each case.

Due notice of appeal was given in each case, and as the same point is included in each, I declare that the appeals should be consolidated.

Nov. 9.

The case originally came before LORD O'BRIEN, L.C.J., and FITZGIBBON, WALKER, and HOLMES, L.JJ. ; but on its appearing that one of the questions raised by it was as to how far the Court was bound by the decision in *Alexander* v. *Burke* (2), the arguments were adjourned in order that the other Judges should be summoned to hear the case.

Nov. 16, 17.

The case accordingly now came on before the full Court.

Samuels, K.C., and *Boyd*, for the appellant :—

Bannon v. *Hanrahan* (3) and *M'Quade* v. *Charlton* (1) show that the room out of which the respondent claims his vote is not a "dwelling-house" : it is, under the circumstances set

(1) *Ante*, p. 383. (2) 22 L. R. Ir. 443. (3) [1900] 2 I. R. 455.

forth in the case stated, merely a room in which he sleeps, and not the house in which he dwells. The judgment of Holmes, L.J., in the former case also shows that there is no such relation here between the Superior of the Order and the other members as is necessary to ground the claim for the "service" franchise. The Revising Barrister was, on his view of the facts, inclined to decide in our favour: he virtually says that if he felt himself at liberty so to find, he would have found as a fact that there was no dwelling-house separately occupied by the voter, but he thought he was bound by *Alexander* v. *Burke* (1) to find the bedroom in which the voter slept was his dwelling-house. But *Alexander* v. *Burke* (1) is no longer law. It was—as the Judges, in giving judgment in it, say—based on *Hasson* v. *Chambers* (2) and *Stribling* v. *Halse* 3); and having regard to *M'Quade* v. *Charlton* (4), *Bannon* v. *Hanrahan* (5), and *Barnett* v. *Hickmott* (6), it must be taken that *Stribling* v. *Halse* (3) is overruled; and if so, the decision of this Court in *Hasson* v. *Chambers* (2), in which the majority of the Court only followed *Stribling* v. *Halse* (3) for the sake of conformity, must be disregarded. This Court sitting to hear registration appeals has jurisdiction to review a previous decision of its own, and is not bound to follow that decision if it comes to the conclusion that it is wrong in law: see Barry, L.J., in *Hasson* v. *Chambers* (2); Fitz Gibbon, L.J., in *Brown* v. *Buchanan* (7); and the decisions of the full Court in *Comiskey* v. *Byrne* (8), and *M'Keown* v. *Bradford* (9).

[They also cited *Clutterbuck* v. *Taylor* (10); *M'Daid* v. *Chambers* (*Gailey's Case*) (11).]

Wylie, K.C., and *James O'Connor*, for the respondent:—

The Revising Barrister was right in holding that he was bound by *Alexander* v. *Burke* (1) to declare the respondent entitled to the franchise: he claims now in respect of the very room which

(1) 22 L. R. Ir. 443.
(2) 18 L. R. Ir. 68.
(3) 16 Q. B. D. 246.
(4) *Ante*, 383.
(5) [1900] 2 I. R. 455.
(6) [1895] 1 Q. B. 691.
(7) [1894] 2 I. R. at p. 334.
(8) 6 Ir. Jur. (N. S.) 109.
(9) 7 Ir. Jur. (N. S.) 175.
(10) [1896] 1 Q. B. 395.
(11) 2 Lawson, 55.

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was there decided to be his dwelling-house, and he occupies it under the very same circumstances as he occupied it when that case was decided. No doubt there has been a little more evidence given at the recent hearing before the Revising Barrister, but the actual facts are the same. This Court has decided in *Alexander* v. *Burke* (1) that on those facts the respondent is entitled to the franchise. It cannot now decide that his name should be struck off the register. In *Torish* v. *Sproule* (2) the Court of Appeal held that a claimant who had an imperfect title to the qualifying premises was, nevertheless, in sole occupation as tenant so as to entitle him to a vote. In *Sproule* v. *Buchanan* (3) the Court of Appeal reversed the decision of a Revising Barrister in a subsequent year, who, on the same facts, but with additional evidence, held that the same voter had not occupied the same premises as sole tenant. It was expressly stated in that case that this Court was bound by its former decision.

Prior to the Act of 1878 (41 & 42 Vict. c. 26), s. 5, a question had arisen as to whether a severance, structural or practical, was not necessary to constitute part of a house "a dwelling-house" for the purpose of the franchise: *Thompson* v. *Ward* (4) and *Boon* v. *Howard* (5). But the definition in that section was enacted to remove this question, and it is now settled that a single room or a bedroom may be a dwelling-house for the purpose of qualifying a man for a vote: *Holly* v. *Burke* (6); *M'Grory* v. *Chambers* (*Gailey's Case*) (7). These cases show that if a person has the exclusive use of a bedroom, though he has joint occupation of other parts of the house, he is entitled to the franchise. The decision in *Barnett* v. *Hickmott* (8) turned on there being no separate occupation of the qualifying premises, the cubicles out of which the votes were claimed not being structurally separated in the complete manner in which the bedrooms were in *Stribling* v. *Halse* (9). This distinction between the two cases is expressly drawn by the Lord Chief Justice in the later case. The evidence in this case clearly proves

(1) 22 L. R. Ir. 443.
(2) 1 Lawson, 94.
(3) 2 Lawson, 51.
(4) L. R. 6 C. P. 327.
(5) L. R. 9 C. P. 277.
(6) 22 L. R. Ir. 463.
(7) 1 Lawson, 18.
(8) [1895] 1 Q. B. 691.
(9) 16 Q. B. D. 246.

that the respondent has the exclusive use of the room which forms his qualifying premises, and that it is completely separated in structure from every other room.

There is no restriction here on the user of the room by the voter as there was in *Clutterbuck* v. *Taylor* (1) and in *M'Quade* v. *Charlton* (2). The respondent plainly occupies this room by virtue of his "office, service, or employment." Except for this office, service, or employment, he would not be in occupation of the room.

Samuels, in reply.

Nov. 17.

LORD O'BRIEN, L.C.J. :—

The question in this case is whether the Revising Barrister, Mr. Ignatius O'Brien, was right in deciding that the members of the Communauté du Saint Esprit, at the French College, Blackrock, are entitled to the parliamentary franchise for the coming year. His own opinion upon the evidence was that they were not so entitled, but out of deference to the judgment in *Alexander* v. *Burke* (3), pronounced in this Court in the year 1887, declaring them entitled to the franchise, he retained the members of the Community on the list of voters. In the case which he has stated for our decision he says :—"Having regard to the case of *M'Quade* v. *Charlton* (2), to the additional facts proved, and the non-production of the deed, I should have found, if I thought I was at liberty to do so, that in no case was the bedroom occupied by a member of the Community a dwelling-house inhabited by him by virtue of his office or employment as a teacher or lay brother; but as there was a decision of the Court of Appeal in respect of the same institution, and, as to the teachers, in respect of the same gentlemen, which had not been expressly overruled, I considered I should not be justified in disregarding it, and I accordingly retained the names of the Rev. Hugh O'Toole and the others named in the schedule."

It is quite plain that the individual opinion of the learned Revising Barrister was that upon the evidence the members of the Community were not entitled to the franchise, and in this opinion I think he was right.

(1) [1896] 1 Q. B. 395. (2) *Ante*, p. 383. (3) 22 L. R. Ir. 443.

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The question really is—Is the French College at Blackrock one dwelling-house, in which the members of the Community have separate sleeping rooms, or is the College an aggregation of dwellings, each member of the Community occupying his bedroom as a separate dwelling? Now, if any person said to that embodiment of common sense, "the man in the street," that Blackrock College was an aggregate of separate dwellings, and not one dwelling or home, consisting, amongst other places, of mere bedrooms, I think the good sense of the "man in the street" would be much offended. In no place, one would say, could such a proposition meet with acceptance. However, it was accepted in this very Court in *Alexander* v. *Burke* (1), in the case of the very same College—the French College at Blackrock. That decision was pronounced in this very Court, and it is argued that we cannot now reverse it; that were it an erroneous decision, we are bound by it, as the main facts remain the same. Mr. Wylie, in his clear argument, contended that if the main facts remain the same, though there may be of those facts new and additional evidence, still the facts being the same, the decision must remain the same. Identity of facts (he argued) necessarily involves identity of decision.

I think in the argument on behalf of the respondents the fact was overlooked that the previous decision was merely a decision that the members of the Community were entitled to be put on the register for one particular year, whereas in the present appeal the question related to their being on the list for another and a different year.

I ventured to ask Mr. Wylie is it possible that we, sitting in this Court, which is a Court of peculiar jurisdiction, cannot review a decision of our own if we are satisfied it is wrong. Mr. Wylie was unrelenting, and pressed us with our decision in the case of *Sproule* v. *Buchanan* (2). Certainly that was a case in which this Court, consisting of its normal number of four Judges, held itself bound by a previous decision, which it refused to review, though it was apparently wrong. I find I said that a decision in favour of the franchise was a decision "almost equivalent to a judgment *in rem*." I used these words to show the very great caution we should exercise before refusing to follow a previous

(1) 22 L. R. Ir. 443. (2) 2 Lawson, 51.

decision. A judgment in one of these registration cases has not of course the effect, strictly speaking, of a judgment *in rem*, though the judgment cannot be questioned during the particular year for which the voter is put on the register. "*In rem*" was an expression used by Barry, L.J., during the argument, However, Barry, L.J., in giving judgment thus expresses himself:— "I entirely agree in the proposition that the reversal of former decisions ought to be done with all solemnity and due consideration, and that the Court should be as full as possible." And the Lord Chief Baron said: "Although, as I understand it, this Court can reconsider, in Registration Appeals, its own decisions, though a single Judge cannot go against them, yet there can be a special reconsideration by the full Court." To the same effect are the observations of Chief Justice Bovill and Lord Esher in *Hadfield's Case* (1), which were referred to at length by Fitz-Gibbon, L.J., in *Brown* v. *Buchanan* (2).

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I think we should be very slow, in a Court similarly constituted in point of members to that which decided the former case of *Alexander* v. *Burke* (3), to expressly dissent from and refuse to follow that decision, though I do not say we would not have jurisdiction and authority to do so. Accordingly, following the course pointed out by the Lord Chief Baron and Lord Justice Barry in *Sproule* v. *Buchanan* (4), when the authority of the former decision was called in question we asked the Master of the Rolls and the Lord Chief Baron to sit here to-day to assist us in the determination of this case.

We have then power to review and refuse to follow the previous decision pronounced in the case of the French College at Blackrock. The question remains, should we do so? Now, before I advert to the character of the judgments in that case, and to the discredit which has since attached to the English case, upon which the majority of the Court rested their decision, I shall very shortly state the reasons which lead me to the conclusion that the members of the Communauté du Saint Esprit at the French College at Blackrock are not entitled to the franchise. My view is that the rooms in respect of which they claim the franchise are not their separate

(1) L. R. 8 C. P. 306.
(2) [1894] 2 I. R. at p. 334.
(3) 22 L. R. Ir. 443.
(4) 2 Lawson, 51.

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dwellings, but merely their sleeping-rooms. There are several factors which, taken together, show that these rooms are not separate dwellings. First, there is no contractual right to the particular room. The room is allotted to the occupant by the bursar apparently at his discretion, and the respondents have apparently no discretion as to whether they will occupy it or not. Secondly, these gentlemen may be ordered at any moment to cease sleeping in the allotted rooms at the command of the resident Superior, subject to an appeal to the Provincial, and from him to the head of the Order. Indeed, it is found that the Superior-General has power to remove any member of the Community from the College to any other house of the Order. Thirdly, it would be against the rules of the Community for the respondents to receive guests, or to dine in their sleeping-rooms. The way in which this is signified in the case is as follows:—"If guests are received at the College they are entertained in the refectory or in the parlour; never in the room occupied by the member in respect of which the franchise is claimed." Fourthly, the furniture in the room is not theirs; it is paid for out of the general funds of the College. Fifthly, they do not pay the servants who clean out and make up the room; the servants are provided by the College; no member has a special servant of his own.

Now, all these matters, taken together, plainly show that the room out of which each of these gentlemen claims to vote as his dwelling-house is a mere bedroom, and not a separate dwelling.

Putting the test put by Lord Esher and Lord Justice Lopes in *Clutterbuck* v. *Taylor* (1), I ask—Are these incidents consistent with the ordinary idea of a dwelling-house? Manifestly they are not, and accordingly I hold that the room is a bedroom, and not a dwelling or house. The factors, the circumstances to which I have referred, plainly show that the particular sleeping-room was not a *domus*, and that the gentleman who sleeps in it is not a *dominus* in relation to it. This view is entirely borne out by a consideration of the character of the Community. It is a religious Community bound by the vow of obedience. This is common knowledge. It is plainly not analogous to a village community, where there is an aggregation of separate dwellings. It is, in its essential charac-

(1) [1896] 1 Q. B. 395.

teristics, its attributes and incidents, a teaching family, living in one home (the College), and having in that College separate sleeping apartments. That this is the correct view I entertain no doubt whatever, notwithstanding the decision in *Alexander* v. *Burke* (1), which is not only wrong, but, in my opinion, manifestly wrong.

The foundation of the judgment in *Alexander* v. *Burke* (1) was *Stribling* v. *Halse* (2). Here is what Lord Morris says:—"On the first question, speaking for myself alone, I should not have arrived at the same conclusion as the Revising Barrister, viz. that the bedroom was a 'dwelling-house,' unless he may have considered himself bound by the decisions which have been pronounced, and which also bind us, as to whether a bedroom can be a 'dwelling-house.' That question was, however, decided in *Stribling* v. *Halse* (2), which was followed in this Court in *Hasson* v. *Chambers* (3). I think it never was intended by the Legislature that because a man slept in a room by himself, and thus occupied a separate bedroom, he should be considered as occupying a separate 'dwelling-house.' I am entirely opposed to those decisions, but I feel myself bound by them. In *Hasson* v. *Chambers* (3) all the Judges comprising the majority of the Court said that they merely followed the decision in *Stribling* v. *Halse* (2)." His own opinion was against the vote, but he yielded his own view in deference to *Stribling* v. *Halse* (2). Barry, L.J., says:—"If I were asked to decide for myself whether the bedroom could constitute a 'dwelling-house,' I should say that it could not; but the question was otherwise decided, and the facts here are, in legal effect, undistinguishable from those in previous cases." Naish, L.J., adds:—"I think we are concluded by the authority of *Stribling* v. *Halse* (2), and the Revising Barrister could not have decided that question otherwise than he did." So far as the opinions of the Judges go, their individual opinions were that the claimants were not entitled to the franchise except for the decision in *Stribling* v. *Halse* (2).

The decision in *Stribling* v. *Halse* (2) has been much canvassed. In *Hasson* v. *Chambers* (3) two members of this Court delivered

(1) 22 L. R. Ir. 443. (2) 16 Q. Q. D. 246. (3) 18 L. R. Ir. 68.

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elaborate and instructive judgments dissenting from it, and Barry, L.J., expressly reserved to himself power to reconsider the case. How has *Stribling* v. *Halse* (1) been treated since? I will not repeat what I said in *Bannon* v. *Hanrahan* (2), or in *M'Quade* v. *Charlton* (3). We have the Master of the Rolls and Fitz Gibbon, L.J., dissenting from the decision in *Hasson* v. *Chambers* (4). We have the Chief Baron dissenting from it in *M'Daid* v. *Chambers* (*Gailey's Case*) (5). May, C.J., says in *Hasson* v *Chambers* (4):—"Had we to consider this case without regard to any authority, I must confess I should be inclined to hold that such a mode of user and enjoyment did not constitute a habitation of a dwelling within the meaning of the Acts." He then refers to *Stribling* v. *Halse* (1), which had been recently decided in England, and apparently with reluctance defers to its authority.

Now, before I refer to the case of *M'Quade* v. *Charlton* (3), I would like to say why I think *Stribling* v. *Halse* (1) is wrong. I think the Judges proceeded on the view that once it was found there was separate occupation of a bedroom, it followed that it was separate occupation of a dwelling-house. This is the fundamental error. Separate occupation of a room in which a person sleeps may be an element in determining whether it is a bedroom strictly so called, or a dwelling, but it does not necessarily follow because a room is separately occupied as a sleeping apartment that the room so occupied is a separate dwelling. The principle of the decision, the *ratio decidendi*, in *Stribling* v. *Halse* (1) was, in my opinion, and with very great deference to the eminent Judges who took part in the decision, wrong.

I now come to *M'Quade* v. *Charlton* (3). Walker, L.J., there said:—"I think the Revising Barrister has shown by the case that there was no evidence that this room was the dwelling-house of the claimant. All he had was the right to use it as a sleeping-place at a time determined by the manager. But it was said that the case was not fairly distinguishable from *Stribling* v. *Halse* (1). We are not bound by that case, except by the comity of Courts,

(1) 16 Q. B. D. 246.
(2) [1900] 2 I. R. 455.
(3) *Ante*, p. 383.
(4) 18 L. R. Ir. 68.
(5) 2 Lawson, 55.

and we find it has been discredited by the English Court." If May, C.J., and Barry and Naish, L.JJ., were here to-day, the fact that the case has been discredited would be a reason why they would not follow it. The reason which induced them to follow it before would no longer prevail. Walker, L.J., continues :— "Why, therefore, should we be bound by it, if we do not agree with it? If I had been a member of the Court in *Hasson* v. *Chambers* (1), I should have followed the Master of the Rolls and Lord Justice Fitz Gibbon, and I consider myself now perfectly free to dissent from the discredited decision of *Stribling* v. *Halse* (2)." Lord Justice Holmes says practically the same thing :—"The only difficulty I have is to distinguish the case from *Stribling* v. *Halse* (2). If that case were binding on this Court, I think I would have to affirm the decision of the Revising Barrister. Having regard to the subsequent cases where that case was considered, I am of opinion that this Court is not bound by it, and that I am free from it." All the Judges before whom *Stribling* v. *Halse* (2) came, both in this country and in England, have dissented from it. That being so, it is plain that the basis of the decision in *Alexander* v. *Burke* (3) is gone.

Mr. Wylie referred to *M'Grory* v. *Chambers* (4), in which case he contended this Court had approved of *Stribling* v. *Halse* (2). But when that case is examined it will be seen that what was there contested was the *bona fides* of the agreement by which the contractual relation was established, and this Court said simply that the question of *bona fides* was one of fact for the Revising Barrister, and affirmed his decision.

My last observation is this: I think this case is practically decided by *Bannon* v. *Hanrahan* (5). The respondent here occupies his bedroom as the nuns did in that case, not by virtue of any contract or service, but as a member of the Community which, like one family, occupies the French College as its dwelling-house or home. It is impossible to hold that the bedrooms of the respondents are their separate dwelling-houses.

(1) 18 L. R. Ir. 68.
(2) 16 Q. B. D. 246.
(3) 22 L. R. Ir. 433.
(4) 1 Lawson, 18.
(5) [1900] 2 I. R. 455.

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THE MASTER OF THE ROLLS:—

I entirely agree. The Lord Chief Justice has dealt with the cases fully, and I have but little to add to his judgment.

On the question of jurisdiction I entertain no doubt whatever that it is open to this Court, sitting as it is under a special statutory authority, to review its own decisions. It is certainly open to the full Court, consisting of all its members, as in this case, to do so. If it were not so, the very gravest inconvenience might result.

Suppose it were not so—take the present case, and *Alexander* v. *Burke* (1), with which it is identical, and see the result. *Alexander* v. *Burke* (1) followed *Hasson* v. *Chambers* (2), which was decided with a view to establishing uniformity of decision between the English and Irish Courts. But instead of leading to uniformity it would lead to diversity of decision if this Court was bound to follow *Hasson* v. *Chambers* (2) for all time, though the English Courts have discredited *Stribling* v. *Halse* (3), on which *Hasson* v. *Chambers* (2) was founded.

There is no estoppel on the parties; the decision that a person was entitled to the franchise in one year does not estop an objector from contending that that person is not entitled to a vote in another year, or *vice versâ*.

I deal with the case as one wholly depending on a question of fact. It lies on each claimant to show that he occupies a dwelling-house. The dwelling-house in respect of which the franchise, in the present case, is claimed is not the whole aggregation of buildings occupied by the Communauté du Saint Esprit, but is, in each instance, a bedroom in those buildings. A great deal of argument was addressed to us, founded on the assumption that we were only dealing with the case of teaching members of the Community. But the case deals with lay brothers also, who do not teach. I take it the same principle applies in both cases.

Again, Mr. Wylie is right in thinking that it lay on him to show that there was an "office, service, or employment" here. Mr. O'Connor suggested that it was not necessary to show more than that the bedroom was occupied by reason of an office held by the claimant. Speaking for myself, I should say if a person claims in

(1) 22 L. R. Ir. 443. (2) 18 L. R. Ir. 68. (3) 16 Q. B. D. 246.

respect of an office, he must show that he is under some contractual obligation to discharge the duties of that office with a correlative right to the residence. I do not, however, think it necessary to give any opinion on this branch of the case. The question really is, was there a dwelling-house? If there was no dwelling-house, the question of service or office becomes immaterial.

The relation of a teaching brother to a Community like that at Blackrock is very material to consider in deciding whether or not occupation of a bedroom by a member of the Community is to be considered occupation of a dwelling-house. No one can argue that occupation of a bedroom may not be occupation of a dwelling-house within the meaning of the Act of Parliament in certain circumstances. In some cases the right to such occupation may be strictly contractual, but here, I think, the occupation is purely permissive. It is immaterial whether the occupants of these bedrooms occupy them by virtue of the permission of Father Murphy the president, or of the head of the Order in Paris. The important considerations are that the use of the room by the occupant is permissive and as a member of the Community only, so that he could not maintain an action of trespass for interference with the room. The sole use made of the room is to sleep in it. Mr. O'Connor pressed us to hold that, of course, each occupant had a key of his room, and that he must have used the room for the purposes of study and for preparing lectures. But there is not a scintilla of evidence of anything of the kind in the case stated, and in this case, above all others, I decline to draw any inference, because neither the trust deed nor rules of the Order were produced. The trustees possibly thought it was their duty not to produce their deeds: possibly they were right; but I do not think any such excuse applies to the non-production of the rules. The rules of the Order were produced in the analogous case of *Bannon* v. *Hanrahan* (1), and were incorporated in the case by the Revising Barrister.

Each of the respondents is a member of the Community which occupies Blackrock College. Considerable help in deciding the question before us is to be derived from this fact. It implies that all the respondents live together under a paternal and domestic

(1) [1900] 2 I. R. 445

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control; that they are all either engaged in teaching or in the performance of some work ancillary to that object, domestic or otherwise; that they have their meals together; that they assemble together for worship. The only suggestion of any separate user of any part of the common building is the separate user of these bedrooms, and even the furniture in them does not belong to the occupants. Each claimant uses the bedroom simply for the purpose of sleeping in it. Their occupation is part of the discipline of the establishment, and nothing else. The principle must be just the same as if instead of having separate rooms the discipline of the Order required them to occupy as many beds in one large dormitory, with or without open cubicles. In my opinion the case is ruled by the decision of this Court in the nuns' case (*Bannon* v. *Hanrahan* (1)), though the nuns there were not a teaching body; and I think it would be an abuse of language to say that each of these bedrooms is the dwelling-house of the person who sleeps in it.

PALLES, C.B.:—

I agree with all that has been said by the Lord Chief Justice and the Master of the Rolls, but I rest my judgment not only upon the reasons given by them, but also upon another, to which they have not referred. Before, however, I mention it, I desire to say a word as to the argument that we are precluded by *Alexander* v. *Burke* (2) from entering on the discussion. Having been a member of this Court since its constitution in 1877, my recollection is that we have acted upon *Hadfield's Case* (3) without one single departure from it. There has not been, to my knowledge, a single case in which we held that *the Court* was bound by a previous decision of its own which it subsequently was of opinion had been wrongly decided. There may, however, have been, and I think there were, some cases from which persons who were unaware of a convention arrived at by the members of the Court, shortly after its constitution (and constantly announced in their judgments), may have thought involved the contrary. Further, I am not certain that the practice which was the result of that

(1) [1900] 2 I. R. 445. (2) 22 L. R. Ir. 443. (3) L. R. 8 C. P. 306.

convention was reported with the same fulness and precision as it was stated in our judgments. It is therefore right that, once for all, I should re-state it fully.

The Court, at its constitution, consisted of seven members. Four usually sat to hear Registration Appeals. Now, although a Court of four had *the power* of declining to follow a decision of a previous Court of four different Judges, or even of the full Court, it had no authority to overrule it, so that had the power to decline to follow been usually exercised, where there was not the power to overrule the previous inconsistent decision, there would not have been any certainty of decision. That arrived at in any particular case might depend upon the individual Judges who happened to constitute the Court, and County Court Judges could not know which of two inconsistent decisions they ought to follow. Such a practice would have involved registration law in chaos. We, therefore, arranged that we should act on our previous decisions except when sitting in a Court specially summoned (as is the present Court) to reconsider the question determined by the impugned decision, of which every member of the Court should have notice. It was not thought necessary that every member of the Court should actually attend: it was thought sufficient that he should have an opportunity of doing so.

Mr. Wylie thinks that our decision in *Sproule* v. *Buchanan* (1) is contrary to that practice. But if Mr. De Versan's note of that case is consulted, the following note of what I there said will be found: "If it had not been for the previous case of *Torish* v. *Sproule* (2), had this case come up for the first time I should be clear that the vote should not be allowed. It was decided in England, in *Burton* v. *Langham* (3), that in such a case a bailiff would not be entitled, where the possession is not as tenant or owner. But I cannot give effect to my own opinion or to that decision, because it has been held in a case in relation to the same farm that this occupation is as tenant, although the previous tenant made no will, and notwithstanding that the minors would become beneficial owners of that property. But I am not free. This is not to be taken as an approval by me of the principle laid down in *Torish* v.

(1) 2 Lawson, 51. (2) 1 Lawson, 94. (3) 17 L. J. C. P. 253.

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Sproule (1). Although, as I understand it, this Court can reconsider in Registry Appeals its own decisions—a single Judge cannot go against them—yet *there can be a general reconsideration by the full Court.*"

Mr. Wylie also urged that although we were not bound by the decision in point of law, at least as regards these particular voters, there was in *Alexander* v. *Burke* (1) a decision in their favour which could not be reviewed. The legal meaning of that argument is that the previous decision was a judgment *in rem*, and that the present contention is in relation to the *res* there adjudicated upon. No doubt that previous decision was a judgment *in rem*, but the *res* there was the register then under consideration, the register for the year then next. As regards any other register (such as that for next year, with which the present question is conversant), its force is no more than that of an authority.

So much for the preliminary point. I now come to the main question, was *Alexander* v. *Burke* (2) rightly decided?

I desire to point out, in the first instance, that it was held there that where the Revising Barrister sets forth in the case stated all the circumstances of a case, and *from them* draws an inference of fact, which the circumstances so stated are incapable of supporting, the error is one not of law but of fact, and is not reviewable in this Court. There the case stated:—

> "I held that, *under the circumstances above stated,* the bedroom occupied by the Rev. Nicholas Brennan was a dwelling-house for the purposes of the franchise, and was occupied by him during the qualifying period, by virtue of his office or employment as a teacher in the College."

In his judgment, Sir M. Morris, C.J., says:—

> "What the facts of this case, however, enabled the Revising Barrister to hold as matters of fact is a question for him, and I have no doubt that the arguments addressed to us were addressed to him, or the substance of them, and we have his finding before us. Can we then go behind that finding, that this man's bedroom was his 'dwelling-house,' when the decisions show that a bedroom *may be* a 'dwelling-house'? I am entirely opposed to those decisions, but I feel myself bound by them."

(1) 1 Lawson, 94. (2) 22 L. R. Ir. 443.

In my opinion, when the facts from which the Revising Barrister draws a conclusion of fact are set out in the case, and the facts so set out are not capable of supporting that conclusion, the error is one of law, and we have jurisdiction to reverse the decision it involves. The question involved in such a case is identical with that which arises at Nisi Prius, where at the close of the evidence it is insufficient to support the plaintiff's case. In such a case it is misdirection for the Judge to leave the question to the jury. I, therefore, am of opinion that it was open to the Judges in this Court in *Alexander* v. *Burke* (1) to decide whether, on the facts stated by the Revising Barrister, it was open to him to draw the conclusion that the bedroom was a dwelling-house occupied by the claimant by virtue of his office or employment of teacher; and had they so held, it is clear from the observations of Lord Chief Justice Morris that he at least would have decided differently from the Revising Barrister.

In the present case there is not any finding that the relation of employer and employed exists, or that any of these gentlemen hold any office by virtue of which they occupy their bedrooms; and even if there were such a finding, I should, as I have said, hold myself at liberty to consider and determine whether the evidence was sufficient to sustain it. Being thus free to consider the evidence, I am of opinion, for the reasons stated by the Lord Chief Justice and the Master of the Rolls, that it is not sufficient.

There is, however, something more. It is clear that it is not stated in the case, nor do we know, whether these gentlemen have taken monastic vows, nor do we know the arrangement under which they work together—whether it is of a permanent, or of a temporary character. But knowing, as the Common Law knows, the relation which existed in pre-Reformation times between an abbot and his monks, I hold that the relation between the claimant and the head of the College, which is to be inferred from the facts here, is one which does not substantially differ from that which in those times existed between an abbot and an individual monk—a relation which was in no sense that of employer and employed. I consequently refuse to draw from these facts an inference of the latter relation.

(1) 22 L. R. Ir. 443.

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Then do these gentlemen hold offices? I am quite prepared to hold that various positions held by Catholic clergymen in connection with colleges, such as that under consideration here, might amount to "offices" within the meaning of the statute. But when the franchise is claimed by virtue of an occupation incident to or depending on an "office," some evidence of the existence of that office must be given. To show the existence of any such office here the claimants should have put in evidence either the constitution or the rules of their Order, or the document which created the alleged office; or if it be alleged to have been created by parol, which I think is more than doubtful, the parol evidence to that effect should have been given. This has not been done, and therefore there is no evidence on which the existence of any such office can be found.

I rest my judgment, then, on the absence of evidence of the existence of the relation of employer and employed, or of any of the claimants holding an office.

I am further of opinion that *Alexander* v. *Burke* (1) was wrongly decided, and, as I understand, this Court now overrules it, and as I know that this Court was summoned to decide whether *Stribling* v. *Halse* (2) was rightly decided, I have no hesitation in adding that I agree with my colleagues on this point. The first time that that case was cited in the Court where I was sitting, I stated my opinion that it was wrongly decided, and indeed every member of this Court has at one time or another expressed the same opinion. I entirely agree with what the Lord Chief Justice has said as to the reason of the error there. When the learned Judges there held that there was separate occupation of the room then—as ancillary to determining whether that separate occupation was occupation of it as a "dwelling-house"—they should have taken the further step of discussing the *purposes* for which it was occupied. They should have ascertained whether such purposes were all or *some only* of those for which a "dwelling-house" is used. This further step they did not take.

The bedrooms of the claimants in the present case, to use the language of some of the authorities, fulfilled one, but one only,

(1) 22 L. R. Ir. 443. (2) 16 Q. B. D. 246.

of the functions of a dwelling-house. The claimants live in community. They have, in my opinion, but one dwelling. Each of them lives and dwells in that one dwelling, and no part of it is used as a separate dwelling-house by any one of the claimants.

FITZ GIBBON, L.J. :—

To deliver another judgment after all that was said in *Hasson* v. *Chambers* (1), and that has been said since, is *ingens iterare aequor.*

I have nothing to add as to our duty and freedom to reconsider our previous decision. But it may be useful to recapitulate the legislation to establish the principle for which the Master of the Rolls and I contended in *Hasson* v. *Chambers* (1), and which I understand this Court now to adopt, viz.—that a bedroom, though separately occupied, is not necessarily a "dwelling," and that the exclusive occupation of a "Dwelling House," as defined in the Acts, is essential to the "Household Franchise."

The Act of 1867 (30 & 31 Vict. c. 102), section 3, first defined the premises necessary to qualify a householder. He must, during the whole of the qualifying year, "have been an Inhabitant Occupier, as Owner or Tenant, of a Dwelling House within the Borough." This is still essential, though the definition has been somewhat extended.

Under the Act of 1867, section 61, "Dwelling House" includes any Part of a "House occupied as a separate Dwelling, and separately rated to the Relief of the Poor." "House" means *building* or *structure*, and the term is nowhere used to describe the premises which qualify a Householder except either in the form "Dwelling House," or coupled with the words "separately occupied as a Dwelling." "Dwelling" and "Dwelling House" are, therefore, synonymous. Section 3 enacted that joint occupation of any Dwelling House should not qualify, and this restriction has never been relaxed. The exclusive occupation of a separate "Dwelling House" is still necessary, but that Dwelling House may be only "Part of a House," and the same building may comprise more separate "dwellings" than one.

(1) 18 L. R. Ir. 68.

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The Act of 1868 (31 & 32 Vict. c. 49), section 4, qualifies any Lodger who, separately and as sole Tenant, has occupied lodgings of the prescribed value, "such Lodgings being Part of one and the same Dwelling House." Lodgings therefore must be Part, and only Part, of a "Dwelling House." The essence of the Lodger's qualification is that he has not got a separate Dwelling, the essence of the Householder's qualification is that he has.

The Act of 1878 (41 & 42 Vict. c. 26), section 6 (3), qualified "joint lodgers," but the "Household Franchise" has never been extended to joint occupiers. If there are two occupiers in the same "Dwelling House," neither can be qualified as a Householder.

The same Act, section 5, repeats the enactment of 1867 that the term "dwelling-house" shall "include any part of a house where that part is *separately occupied as a dwelling*"; but it adds—

> "Where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately, by reason *only* that the occupier is entitled to the joint use of some other part."

This does not qualify the necessity for the separate occupation *as a dwelling* of the "part of a house" which forms the qualifying dwelling-house. It merely provides that where it is "part of a house," it shall not lose its qualifying power by reason only of the householder's having the joint use of some other part of the same building. Cases of stairs wash-houses out-offices or the like, used jointly, were met by this provision, but the part of the house of which the voter has the sole and exclusive use must still, in substance and essentials, be a separate dwelling.

The Act of 1884 (48 Vict. c. 3), section 2, extended the Acts of 1867 and 1878 to Ireland, by creating "a uniform household franchise and a uniform lodger franchise"; and, in creating the "service franchise," section 3 re-affirmed the principle that a separate "dwelling-house" is essential to the "Household Franchise"—

> "Where a man himself inhabits any *dwelling-house* by virtue of any office, service, or employment, and *the dwelling-house* is not inhabited

by any person under whom such man serves, . . . he shall be deemed . . . to be *an inhabitant occupier of such dwelling-house as a tenant.*"

The qualifying premises must be the same for the "service franchise" as for the "household franchise," but the ownership or tenancy which is required for the latter may be replaced by service in the former.

Section 7 (4) defined "dwelling-house" in Scotland as "any house or part of a house occupied *as a separate dwelling.*" Sub-sections (7) (8) and (9) use "dwelling-house" to describe the premises which alone can qualify, "in Ireland," "both in England and Ireland," and "in any part of the United Kingdom."

The Irish Act of 1885 (48 Vict. c. 17), section 2, enacts—

> "For the purposes of the household qualification created by the Representation of the People Act, 1884, separate rating of a dwelling-house, or part of a dwelling-house, *separately occupied*, shall not be necessary to entitle the inhabitant occupier of same to be registered as a voter in respect thereof."

I think, from all this, that the voter must have, as the basis of the household franchise, a dwelling of his own, which is his home and habitation, and of which he is the separate and exclusive occupant. A mere bedroom is no more a dwelling than is a shop, or an office, and many of us spend more of our time at home in rooms other than those in which we sleep. Unless a man separately occupies all the rooms which, in the ordinary sense of the word, make up his dwelling-house, in my opinion he cannot have the Household Franchise.

It is a question of fact—sometimes a difficult one—whether he does so or not, and we must take the facts from the Revising Barrister.

In this case he says—

> "I should have found, if I was at liberty to do so, that in no case was the bedroom occupied by a member of the Community a dwelling-house, inhabited by him by virtue of his office or employment as a teacher or lay brother."

This is a negative pregnant. He *was* at liberty to find the facts. He alone could do so. The case means—"I find as a fact, being at liberty so to do, that the bedroom was not a

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"*dwelling-house*," *i. e.* it was not part of a house separately occupied as a dwelling, and I also find that—whatever it was—"it was not occupied by virtue of any office or employment." I base my judgment on the finding that this claimant's bedrooms were not separately occupied as dwellings, and that they were not "dwelling-houses" within the Franchise Acts.

I am not able to concur with all that the Lord Chief Baron has said by way of limitation of the "service franchise." I reserve full liberty to consider—when the question arises—whether the words "by virtue of any office, service, or employment," are not wide enough to bring in cases where the relation of master and servant, or of employer and employed, in the ordinary sense, does not exist; and in the present case I incline to think that the teachers of the French College inhabit the College "by virtue of their employment."

But they do not occupy separate dwellings. The French College is not a village; the idea is repugnant to our common understanding, and to the ordinary meaning of words. Those who inhabit the College are a community; they are members of the same household, not fellow-townsmen. They all live in "one and the same dwelling-house"; they have a common home; they are not neighbours. The bedroom which each of them occupies is "part of one and the same dwelling-house," and therefore it could not qualify for any franchise but that of a lodger. One might as well say that each cell in a hive was a separate dwelling, as that each of these bedrooms is a "Dwelling House."

WALKER, L.J.:—

I concur. The case is exhausted by the observations already made. This is a community of teachers, with lay brothers assisting them, occupying the French College, with a separate bedroom assigned to each of them in that building. It is repugnant to the idea of their living in community to say that the fact that each of them sleeps in a separate room makes that room his dwelling-house for the purpose of the Franchise Acts. The entire College is the residence or dwelling-house wherein all the members of the Community dwell like members of one family.

I can quite conceive that under some circumstances a bedroom

may be a dwelling-house for the purposes of the Franchise Acts, as was decided in *M'Grory* v. *Chambers* (*Gailey's Case*) (1). But, as I have said, the facts proved here are repugnant to any such idea. In my opinion *M'Quade* v. *Charlton* (2) is a stronger case against the franchise than the present.

I agree with the Lord Chief Justice that *Stribling* v. *Halse* (3) is wrong, and cannot be followed. As he has pointed out, the fundamental error in that case was that when the Judges determined on the facts proved that the bedrooms were separately occupied they assumed that the bedrooms were separate dwelling-houses. *Alexander* v. *Burke* (4) was founded on *Stribling* v. *Halse* (3), and when the foundation is gone cannot be supported.

I also agree with the Lord Chief Baron that there is no legal evidence of any service or office here within the meaning of sect. 3 of 48 Vict. c. 3. We cannot leave out of sight the relation which exists between the voters as members of a Community in virtue of which his bedroom is assigned to each of them in the French College. No doubt they are all servants in one sense, working together for one great purpose; but they are not servants under any one who has given them these rooms in consideration of their employment by or service to him. It appears to me that in this respect the case is ruled by the consideration pointed out by Lord Justice Holmes in the case of the nuns in *Bannon* v. *Hanrahan* (5).

HOLMES, L.J.:—

Having been one of the three members of this Court who heard the case of *M'Quade* v. *Charlton* (2) last year, I should find it very difficult to hold that the Court is not entitled to review and reconsider its previous decisions on the hearing of Registration Appeals. In *M'Quade* v. *Charlton* (2) we overruled *Hasson* v. *Chambers* (6), after it had been acted on for many years; and it was not suggested on that occasion that we were not at liberty to do so. Had such a suggestion been made, we

(1) 1 Lawson, 18.
(2) *Ante*, p. 383.
(3) 16 Q. B. D. 246.
(4) 22 L. R. Ir. 443.
(5) [1900] 2 I. R. 455.
(6) 18 L. R. Ir. 68.

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probably should have then taken the course of calling the full Court together, which we have followed in the present instance. The rule of law is, that a Court exercising a peculiar jurisdiction is not bound by its former decisions. To hold the contrary would have the effect—at least in some cases—of perpetuating error. Of course a Court is bound to exercise great care and caution in disregarding judgments already given by itself; and I entirely approve of what has been done in this case under the direction of the Lord Chief Justice—an invitation to attend given to every member of the Court. Assuming that I have correctly stated the rule of law, I am unable to distinguish between the reconsideration of a previous decision, where the parties are different and where they are the same, provided that in the latter case no legal estoppel exists. Having thus stated my opinion that we are at liberty to review and overrule *Alexander* v. *Burke* (1), I have nothing to add to what has been already said by this Court in the case of the Fermanagh nuns, which I am unable to distinguish from the present, and which was very carefully considered. I concur in the judgment of the Court for the reasons there given, all of which are, in my opinion, applicable to the French College, Blackrock.

Solicitor for the appellant: *James L. M'Donnell.*
Solicitor for the respondent: *M. Wylie.*

G. Y. D.

(1) 22 L. R. Ir. 443.

IN THE GOODS OF ROSE KENNEDY (1).
CUNNINGHAM *v.* M'DONAGH.

K. B. Div.
Probate.
1904.
Feb. 22.

Practice—Taxation of costs—Disallowances where bill reduced by one-sixth—Professional charges, meaning of—R. S. C., 1893, *Ord. LXV., R.* 44 (*e*), *R.* 64 (40).

The words "professional charges" in Ord. LXV., R. 64 (40), mean professional charges properly so called, and do not include disbursements of any kind. The English practice to the contrary not followed.

MOTION.

This was an application on behalf of the plaintiff, Bridget Cunningham, for an order that the disallowance by Master Mathews of item 169 in the plaintiff's bill of costs of 15*s.* 9*d.*, and also the disallowance of item 178, of £1 taxed off the said bill by the said Master, on the ground that more than one-sixth was taxed off the professional charges thereof, be reviewed, and that the said bill be remitted to him, with a direction to allow both the said items, on the ground that one-sixth had not been taxed off the said bill within the meaning of Order LXV., Rule 40, of 1893.

This action was brought in May, 1903, to establish the will of Rose Kennedy, widow, deceased, dated September 22, 1899, and to condemn a later will of hers, dated September 17, 1900. The defendants James Condon and James Clarke, who were the executors named in the said last mentioned will, did not enter any appearance in the action. The defendant Margaret Ellis entered an appearance, but filed no defence. The defendant Patrick M'Donagh defended the action, and appeared by counsel at the trial, which took place before Barton, J., and a special jury, on December 17, 1903. After the case was opened a compromise was entered into, one of the terms being that the plaintiff's legacy under the will of 1900 was to be doubled, and that she was to get her costs, when taxed, out of the assets of the deceased, and formal

(1) Before ANDREWS, J.

K. B. Div. 1904. CUNNINGHAM *v.* M'DONAGH.

judgment was entered, giving the plaintiff her costs out of the assets.

The plaintiff's costs were lodged in January, 1904, and the disbursements (including £40 11*s.* for witnesses' expenses) amounted to £85 6*s.* 8*d.*, while the professional charges amounted to £49 13*s.* 9*d.*, or £135 0*s.* 5*d.* in all. The costs were taxed on January 18, 1904, and a sum of £14 5*s.* 6*d.* was taxed off by Master Mathews. This sum of £14 5*s.* 6*d.* being more than one-sixth of the sum of £49 13*s.* 9*d.*, Master Mathews disallowed items 169 and 178, which related to the costs for drawing and copying the bill, and for attending the taxation.

The solicitor for the plaintiff objected to these disallowances, and the Taxing Master made the following ruling on the said objections:—

"Order LXV., Rule 64 (40), provides as follows:—'If on the taxation of a bill of costs payable out of a fund or estate (real or personal), or out of the assets of a company in liquidation, the amount of the professional charges contained in the bill is reduced by a sixth part, no costs shall be allowed to the solicitor leaving the bill for taxation for drawing and copying it, nor for attending the taxation.'

"It is admitted that the costs in question are payable out of a fund or estate, and in accordance with the said rule, following the established practice in the office, I disallowed the said items. Order LXV., Rule 44 (*e*), provides *inter alia* that bills of costs are to be prepared with six separate columns—the fifth for professional charges.

"It seems to me that the question under consideration depends upon the meaning to be attached to the words 'the professional charges,' and I conceive and respectfully submit that is supplied by the language of the said Order LXV., Rule 44 (*e*). Under these circumstances I overruled the objections.

"It is true that in England the practice in the Taxing Office is to arrive at the one-sixth part by including 'disbursements' (Annual Practice, 1904, page 992), but there is no judicial authority for such practice to which I have been referred, or of which I am aware, and it will be observed that under Order LXV., Rule 44 (*e*), the fourth column of bills of costs is to be

prepared for 'disbursements.' I have formed the opinion that, having regard to the Rules I have referred to, the 'professional charges' and 'disbursements' constitute distinct and separate classes of items. Perhaps I may state that my colleague, Master Tandy, after a conference with his present colleagues, certified an objection to the foregoing effect, but his decision has not been made the subject of review by a Court or Judge."

T. H. Maxwell, in support of the application :—

The words "professional charges" should not be confined to pure profit costs, but should be construed as including professional payments or disbursements made by the solicitor in the ordinary course of the case, such as fees to counsel, witnesses' expenses, and the like. In England the practice of the Taxing Officer is to arrive at the sixth, by including the disbursements, *i.e.* proper professional payments, and the provisions of the rule (which is the same as the Irish rule) are not applied unless the total bill is reduced by a sixth part : Annual Practice, 1904, p. 992, Order LXV., Rule 27 (38 *b*).

This follows the practice under the Solicitors Act, 1843 (6 & 7 Vict. c. 73), by which the one-sixth is to be taken off the whole bill. *In re Remnant* (1)—a case under that Act—is the leading authority on the subject. Lord Langdale there laid down the rule that a distinction was to be taken between strictly professional charges and disbursements, and independent cash payments, which the solicitor was not bound to make. The Solicitors (Ireland) Act, 1849 (12 & 13 Vict. c. 53), is to the same effect. The sum paid in *In re Remnant* (1) was not an ordinary solicitor's disbursement ; here the payments made by the solicitor are of the ordinary class, and something has been taken off them; but one-sixth has not been taken off.

ANDREWS, J. :—

The question I have to determine is plain, and I cannot yield to this application. If sub-Rule (40) of Rule 64 of Order LXV. stood alone, there would be a good deal to be said in favour of

(1) 11 Beav. 603.

K. B. Div. 1904.

CUNNINGHAM v. M'DONAGH.

Andrews, J.

Mr. Maxwell's argument, that the words "professional charges" should have the meaning given to them in *In re Remnant* (1), as including professional payments or disbursements made by the solicitor in the ordinary course of his duty in the conduct of the proceeding, such as fees to counsel, expenses of witnesses, and other ordinary disbursements. I am precluded, however, from this construction by a previous rule of the same Order, namely, Rule 44 (*e*), by which "professional charges" are distinguished from "disbursements," and are required to be entered in a separate column in the bill of costs, as "disbursements" are also required to be entered. Rule 44 (*e*) requires bills of costs to be prepared with six separate columns, and amongst those the fourth is for "disbursements," and the fifth is for "the professional charges." "Disbursements" and "professional charges" are thus distinguished, and I must construe the words "professional charges" in sub-Rule (40) of Rule 64, having regard to Rule 44 (*e*), as not including "disbursements." I cannot give the words "professional charges" in one rule a different meaning from that which they obviously bear in another rule of the same Order.

The practice in England under Order LXV., Rule 27 (38 *b*), is said to be different, but I must decide this question upon the language of our own Rules, to which I have referred, in which the words "professional charges" plainly do not include disbursements.

Solicitor for the plaintiff: *Leachman.*

W. L.

(1) 11 Beav. 603.

GEOFFREY CHRISTIE MILLER *v.* THE COMMISSIONERS FOR IMPROVING THE PORT AND HARBOUR OF WATERFORD (1).

K. B. Div. 1904. Jan. 14, 21.

(1902. No. 9216.)

Practice—Ejectment—Title—Superfluous lands—Conditional limitation—Forfeiture—Discovery—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18, *s.* 127).

Where, under the provisions of sect. 127 of the Lands Clauses Consolidation Act, 1845, superfluous lands become, in default of sale within the prescribed period, vested in the adjoining owners, the vesting takes place by force of a conditional limitation and not of a forfeiture.

In an action brought to establish title to lands which the plaintiff claimed had become vested in him under the above section, the defendants objected to answer interrogatories, on the ground that discovery might disclose facts in consequence of which lands might become forfeited:—

Held, that having regard to the distinction between a conditional limitation and a forfeiture, the defendants were not entitled to exemption from discovery.

MOTION ON NOTICE.

The action was brought by the plaintiff to establish his title to certain lands in the townland of Christendom, parish of Kilculliheen, and the foreshore of the River Suir, adjacent thereto, in the county of the city of Waterford, and to recover possession thereof, and for mesne profits. The statement of claim alleged that by an Act of 9 & 10 Vict. c. ccxcii., the defendants were constituted commissioners for improving the Port and Harbour of Waterford, and by an Act of 31 & 32 Vict. c. xcvi., incorporating the Lands Clauses Consolidation Act, 1845, the defendants were authorised to construct a dry dock and road and other works connected therewith, and were invested with powers for the compulsory purchase of lands for the purposes of the said Act, which provided that the

(1) Before PALLES, C.B., and JOHNSON, BOYD, and KENNY, JJ.

K. B. Div. 1904.

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said powers should not be exercised after the expiration of five years, and that the dry dock authorised thereby should be completed within ten years from the passing thereof; that in exercise of the said powers for compulsory purchase of lands the defendants purchased the lands above mentioned; that by an Act of 37 & 38 Vict. c. cxvi., it was provided that the powers of the defendants for the construction of the dry dock and road and other works authorised by the Act of 1868 might be exercised within a further period of ten years, but should not be exercised after the expiration of such further period; that the said dry dock was never constructed, and only a part of the said road was made, and all of the said lands became superfluous lands within the meaning of the Lands Clauses Consolidation Act, 1845; that the said lands were not sold within ten years after the expiration of the time limited by the said Act, 37 & 38 Vict. c. cxvi., and at the expiration of that period became, by virtue of the Lands Clauses Consolidation Act, 1845, vested in and the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same, and the plaintiff, as owner of certain lands of Christendom adjoining the said superfluous lands, claimed that portion of the said superfluous lands, containing 4A. 2R. 3½P., had become vested in him, and his property.

The defendants pleaded that they were in possession, relied upon the Real Property Limitation Act, 1874, and alleged that the plaintiff's title to the lands was extinguished by virtue of that Act, and of the 3 & 4 Wm. 4, c. 27, s. 34.

By an order in the action dated 9th November, 1903, the plaintiff was given liberty to administer interrogatories to the defendants, to be answered by their secretary, in pursuance of which a number of interrogatories, chiefly in relation to the mode of acquisition, user, and occupation of the lands in question, were administered by the plaintiff, which latter interrogatories the defendants objected to answer on the ground that the questions related exclusively to the defendants' title to the lands and not to the plaintiff's, and were fishing interrogatories to discover the defendants' case, whereupon the present motion was instituted by the plaintiff for an order that the defendants should

make and file a full and sufficient answer to the said interrogatories.

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Miles Kehoe, K.C., and *J. C. Meredith*, for the plaintiff.

Battersby, for the defendants, contended that inasmuch as discovery might subject the defendants to forfeiture under the provisions of section 127 of the Lands Clauses Consolidation Act, 1845, they were not legally compellable to answer any of the interrogatories in question: *Lyell* v. *Kennedy* (1); *Bishop of Cork* v. *Porter* (2); *Chauncey* v. *Tahourden* (3); *Uxbridge* v. *Staveland* (4).

Meredith, in reply:—

The lands became absolutely vested in the plaintiff on the happening of a condition: *The Directors of the Great Western Railway Company* v. *May* (5); and the action is not one to work a forfeiture. Accordingly, the defendants cannot claim exemption from discovery.

Cur. adv. vult.

Jan. 21.

PALLES, C.B.:—

This question is settled by authority. But before expressing my opinion on it, I wish to put one consideration out of the way. We were referred, and perhaps rightly, at considerable length, to *Lyell* v. *Kennedy* (1), which finally corrected the wrong practice which theretofore existed in England, of refusing discovery in actions of ejectment. That wrong practice never existed in this country. From the time when, by our Common Law Procedure Acts, the Common Law Courts here first obtained the right of granting discovery, it has been uniformly the practice to allow interrogatories in relation to the proper subject matter to be administered in ejectment. As to that, I might refer

(1) 8 App. Cas. 217.
(2) I. R. 11 C. L. 94.
(3) 2 Atk. 392.
(4) 1 Ves. Sen. 55.
(5) L. R. 7 H. L. 283.

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to *The Bishop of Cork* v. *Porter* (1), decided in the Exchequer Division so long ago as 1877, in which interrogatories were disallowed, not on the ground that the action was one of ejectment, but because the ejectment was for a forfeiture, and therefore the old equity rule prevailed, that in such a proceeding discovery could not be allowed.

The action here is brought under, and the question depends upon, the provisions of the Lands Clauses Consolidation Act of 1845 (8 Vict. c. 18), in reference to superfluous lands, and everything turns upon the words of section 127. It is as follows:—

> "And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the Special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows:—
>
> "Within the prescribed period, or, if no period be prescribed, within ten years after the expiration of the time limited by the Special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase-money arising from such sales to the purposes of the Special Act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same."

That provision applies to the lands which were acquired by the defendants here, under the powers of their Special Act—lands which are *prima facie* held in fee, and, as so well pointed out by Mr. Meredith in the course of his very clear argument, they absolutely vest upon the happening of the event mentioned in the section, vest in and become the property of the adjoining owners.

It seems to me as plain as possible that that provision is not in the nature of a forfeiture, but is a conditional limitation.

What is the law in reference to discovery where it is objected to upon the ground that the discovery might disclose facts in consequence of which lands would go over by force of a conditional limitation?

(1) I. R. 11 C. L. 94.

It seems to me to be well settled. As far back as our records go a distinction has been drawn, as to the right of discovery, between cases depending, upon the one hand, upon a forfeiture, and upon the other, upon a conditional limitation. The distinction is stated in Wigram on Discovery, p. 81, and in Lord Redesdale's book on Pleading in suits in the Court of Chancery (Mitford, at p. 234). In cases of the first class discovery is not allowed; it is allowed in those of the second. I do not intend to occupy public time in referring to the authorities which establish this well-settled distinction; but I shall mention one case, viz. that cited by Mr. Battersby as an authority that the defendants were not bound to answer these interrogatories.

In that case (*Chauncey* v. *Tahourden* (1)) an executor brought a bill for the discovery of the defendant's marriage. She demurred, because, if she was to discover what was asked, it would be a forfeiture of a legacy of £1500, which was given to her conditionally if she married with the consent of the trustees under the will. Lord Hardwicke there allowed the demurrer, "as she cannot answer to the marriage without showing at the same time it was against consent." The report states:—"The counsel for the plaintiff insisted that the defendant ought to discover, and compared it to a case before Lord Chancellor Talbot, where a husband gave an estate to his wife by his will whilst she continued a widow, with a limitation over to the plaintiff in the cause, in case of her second marriage."

There discovery was ordered, and Lord Chancellor Hardwicke, in giving judgment in *Chauncey* v. *Tahourden* (1), distinguishes it, saying:—"But in the case before Lord Talbot it was a limitation over of an estate and not a condition, and therefore could not properly be called a forfeiture."

On that distinction between a forfeiture and a conditional limitation, the defendants here are bound to answer such of the interrogatories as have not been already answered.

The order will be to that effect; the plaintiff's costs will be costs in the cause.

(1) 2 Atk. 392.

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MILLER v. WATERFORD HARBOUR COMMRS.

JOHNSON, J.:—

The defendants by their Special Act, 1868 (31 & 32 Vict. c. xcvi.), incorporating the Lands Clauses Consolidation Act, 1845, were authorised to take certain lands (including the lands in question) for the purposes of the works of their undertaking, to be completed within the prescribed period of ten years, extended by their Special Act, 1874, 37 & 38 Vict. c. cxvi., for a further period of ten years. A small part of the works was constructed, the undertaking was abandoned, and land which the defendants had so acquired became superfluous land, not required for the purposes of the defendants' undertaking.

In this state of things, the Lands Clauses Act, sect. 127, required the defendants, within ten years after the expiration of the aforesaid extended period prescribed by the Special Acts for the completion of the works, absolutely to sell and dispose of any superfluous land, which, in default thereof, should vest in the adjoining owners. In the present case this period for sale of superfluous land has expired, the lands in question have not been sold, and the plaintiff as adjoining owner claims them as unsold superfluous land adjoining his land.

The defendants did not acquire the estate in this land subject to a condition that on a specified event their estate in the land should be forfeited; they acquired a statutory title to the estate in the land for the purposes of their undertaking, to be completed within a prescribed period, and subject to this—that within ten years after that period these lands, if not required for the purposes of the undertaking (and therefore superfluous), should be sold, with a limitation over as to this unsold superfluous land "*vesting*" it in the adjoining owners. The present case, therefore, is not one in which discovery would tend to forfeiture; it is rather a case in the nature of a settled estate with a limitation over in specified circumstances. Consequently, although discovery might be withheld in the former case of forfeiture, it cannot be withheld in the latter case of what is not with accurate precision called a conditional limitation over.

It may be that this distinction is a fine one, but it is well established, and will be found stated in the text-books: Mitford, Eq. Pl., 5th ed., 235; and Daniel, Ch. Pr., 7th ed., 1512; and the

authorities are summed up in the exhaustive judgment of Kindersley, V.-C., in *Hambrook* v. *Smith* (1).

The discovery sought for, therefore, cannot be withheld on the ground that it might tend to forfeiture of the defendants' estate in the lands in question, as contended for by Mr. Battersby.

BOYD and KENNY, JJ., concurred.

Solicitors for the plaintiff: *J. & C. O'Connor.*

Solicitors for the defendants: *T. Thornton & Sons.*

R. ST. J. C.

IN THE GOODS OF KATE CASSIDY, DECEASED (2). CASSIDY *v.* FOLEY.

Probate—Practice—Intermeddling with assets before administration—Injunction granted on application of next-of-kin.

Where, shortly after the death of a tenant intestate, the landlord wrongfully entered and seized the goods of the deceased, the Court, on the *ex parte* application of the sole next-of-kin before administration, granted an injunction to restrain the defendant from interfering with the assets, the plaintiff giving an undertaking as to damages.

MOTION.

This was an *ex parte* application on the part of the plaintiff to restrain the defendant from interfering with the goods of the deceased.

Kate Cassidy, spinster, died on January 16th, 1904, at 46 Lower Mount-street, Dublin, intestate, leaving the plaintiff Laurence Cassidy, her brother and sole next-of-kin, surviving. The defendant Matthew Foley was the landlord of the house 46 Lower Mount-street, of which the deceased was tenant. On January 19th the plaintiff's solicitor had an inventory taken of the property in the house, with a view to taking out administration for the plaintiff, and the premises were securely fastened and locked up. On January 20th bailiffs took possession of the premises in

(1) 17 Sim. at p. 212.

(2) Before ANDREWS, J.

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order to distrain for rent due to the defendant by the deceased, having, it was alleged, broken into the house. They refused to allow the plaintiff access to the house. The assets of the deceased, who carried on a private hospital and lodging-house, consisted principally of the furniture in the said house. On January 23rd a writ was issued by the plaintiff against the defendant, claiming (1) a declaration that the plaintiff was the lawful brother and sole next-of-kin of the deceased, and that the plaintiff, as such, was entitled to a grant of letters of administration; (2) that a receiver might be appointed over the goods of the deceased; (3) an injunction to restrain the defendant from intermeddling with the assets of the deceased. On January 25th this application was made *ex parte*.

Moriarty, for the plaintiff :—

The defendant has made an illegal entry upon the premises of the deceased and intermeddled with her property. The Court has power to restrain the defendant on the application of the sole next-of-kin, pending the taking out of administration, but a writ is necessary. He referred to *In the Goods of Moore* (1); *Salter* v. *Salter* (2).

ANDREWS, J., made the following order :—

"IT is ordered by the Court that the defendant Matthew Foley, his servants and agents, be and they are hereby restrained until further order from removing or interfering with any of the goods, chattels, or personal assets of Kate Cassidy, deceased, and also from interrupting or interfering with free access by the plaintiff and his solicitor, R. Robinson Black, to the dwelling-house of the said deceased, No. 46 Lower Mount-street, in the city of Dublin; this order being without prejudice to such rights, if any, as the defendant has or may have with respect to the said goods, chattels, and personal assets, or any of them, and the plaintiff undertaking to abide such order as the Court may hereafter make in relation to any damages, if any, which shall or may be sustained by the said defendant by reason of this order."

Solicitor for the plaintiff : *R. Robinson Black.*

W. L.

(1) 13 P. D. 36. (2) [1896] P. 291.

THE PEMBROKE URBAN DISTRICT COUNCIL *v.* THE COMMISSIONER OF VALUATION (1).

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1903.
Dec. 15, 16.
1904.
Feb. 15.

Rating—Exemption—Hereditaments used exclusively for charitable or public purposes—Technical school—Fees paid by the pupils—15 & 16 *Vict. c.* 63, *s.* 16—17 & 18 *Vict. c.* 8, *s.* 2—62 & 63 *Vict. c.* 50, *s.* 30.

The Commissioner of Valuation having included the Ball's Bridge Branch of the Pembroke Technical Schools in the revision lists of rateable property in the Pembroke Urban District, the District Council appealed to the Recorder of Dublin, who allowed the appeal, but, at the request of the Commissioner of Valuation, stated a case for the opinion of the King's Bench Division.

The Branch School, which provided instruction in such subjects as book-keeping, business methods, mathematics, mechanics, mensuration, shorthand, typewriting, drawing, cookery, dressmaking, laundry, and needlework, derived its funds from four sources, viz.—(1) a special rate levied by the District Council, (2) the Parliamentary grant at the disposal of the Department of Agriculture and Technical Instruction, (3) the Equivalent Grants fund, and (4) a non-compulsory fee of 2*s.* 6*d.* per head charged to the pupils, and expended in providing light and fuel for the school and cleaning the school windows. The school was managed by a committee, which was partly composed of members of the Pembroke Urban District Council and partly of other persons interested in technical education, some of whom resided outside the district:—

Held, that the school was "dedicated to or used for public purposes," so as to be within the exemption of the Valuation Acts, and that the receipt of the fee of 2*s.* 6*d.* per head from the pupils did not, under the circumstances, disentitle it to the exemption.

Guardians of the Waterford Union v. *Barton* ([1896] 2 I. R. 538) distinguished.

CASE STATED for the opinion of the Court by the Recorder of Dublin, pursuant to the 23 Vict. c. 4, sect. 10. The matter came before the Recorder by way of appeal against the decision of the Commissioner of Valuation refusing to alter the valuation of the Pembroke Technical Schools (Ball's Bridge Branch), whereupon the Recorder held that the schools should be distinguished in the valuation lists as being of a public nature, and used exclusively for

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and GIBSON, JJ.

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public purposes. The schools were managed by the Technical Instruction Committee, consisting of thirty-one members, of whom nine were members of the Pembroke Urban District Council, four were ladies, and the remainder was made up of representative clergy of the different denominations, of representatives of trades and industries, and of others interested in technical instruction, some of whom resided outside the district.

The case stated contained the following summary of the evidence and arguments:—Mr. Charles P. Coote Cummins, Secretary of the Technical Instruction Committee, examined for the appellants, deposed: "The Ball's Bridge School is a branch of the Pembroke School, Ringsend, which was established under the Technical Instruction Acts, 1889–1891. Pursuant to these Acts the Urban District Council of Pembroke, as local authority, assess a rate of one penny in the pound on the rateable value of the district, in aid of the technical or manual instruction in the schools. The rate last year realized £461, about one-fourth of which was expended on the Ball's Bridge School. The Department of Agriculture and Technical Instruction, administering under these Acts the Parliamentary grants in aid of technical instruction, contribute £1000 a year to the school, besides £439 per annum from what is known as the "Equivalent Grants" fund. Both schools are under the same Committee of Technical Instruction. The Ball's Bridge Branch is under the general direction and supervision of the Principal of the Ringsend School, and is carried on, as far as found possible, by the teachers already conducting classes at that school. The Ringsend School is distinguished in the valuation lists as a tenement of a public nature, exempt from assessment, and has never been rated."

The Committee of Technical Instruction form a scheme prescribing the subjects taught at each school respectively. The scheme is subject to the approval of the Department of Agriculture and Technical Instruction, and such approval was duly obtained for the existing scheme, viz. the Pembroke Technical Instruction Scheme for the session 1902 to 1903, comprising—(1) instruction at the Pembroke Technical School, Ringsend, in the following subjects: mathematics, mechanics, magnetism and electricity, machine construction and drawing, naval architecture, drawing

(freehand, geometrical, and design), carpentry and joinery, steam, electrical engineering, mechanical engineering, metal working, workshop arithmetic, commercial arithmetic, commercial correspondence, shorthand, typewriting, cookery, laundry work, dressmaking, machine knitting; (2) a branch evening technical school at Ball's Bridge, at which classes were held in book-keeping, business methods, shorthand, typewriting, drawing (including freehand, geometrical, and design), manual instruction, elementary mechanics, mensuration, cookery, dressmaking, laundry work, and needlework.

The scheme for 1903–4 for Ringsend comprised mathematics, applied art, mechanical and electrical engineering, manual instruction in wood and metal, carpentry, and naval architecture, shorthand, typewriting, cookery, laundry work, dressmaking, needlework, and machine knitting; and for the following subjects at Ball's Bridge: mathematics, mechanics, mensuration, applied art, manual instruction in wood, book-keeping, shorthand, typewriting, cookery, laundry work, dressmaking, and needlework.

The technical and manual instruction given in the schools does not qualify the pupils to practise any branch of handicraft, but is an educational or preparatory training in the principles of certain arts and sciences and their application to specific trades and industries. The session lasts about twenty-six weeks. As a rule a fee of two shillings and sixpence per head per annum is charged, but payment is not compulsory, or at any rate exacted in every case. The amount of fees received at the Ball's Bridge School for the session 1902–1903 was about twenty-eight or thirty pounds, which was expended in providing light and fuel for the school and in cleaning the school windows. The teachers do not participate in the school fees, but are paid exclusively from the public moneys derived from the Parliamentary grants or the rates. The cost of the teaching staff last year was about two hundred and ninety pounds. There is no private profit derived from the schools, and the Committee of Technical Instruction have no beneficial interest whatever. The accounts are audited by the Local Government Board auditor. The pupils are chiefly from the district, but both schools are open to all comers without exception, irrespectively of residence, whether within or without the district, and in Ball's

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Bridge School there are pupils who come from outside the district.

Mr. Hunt, for the appellants, contended that the occupation of the premises was exclusively for the public use and benefit, and not for any private profit, which had not been made or sought, and that the small fees charged, which were not in all cases exacted, were expended for the pupils themselves in ameliorating the conditions under which they were taught. The school in question was established under Acts of Parliament and maintained with public moneys for the advantage of the public, and was open to the public at large, without exception, for technical or manual instruction in subjects duly authorized. He submitted, therefore, that the premises were of a public nature, and that the Commissioner of Valuation was bound to distinguish them as such in the list to be exempt from assessment. He referred to the following cases: *The Londonderry Bridge Case* (1), *The Belfast Harbour Case* (2), and *The Sligo Harbour Case* (3).

Mr. Fitzgerald, for the Commissioner of Valuation, contended that the subjects taught were not of such a general character as to be of advantage to the whole community, which he submitted was the ground of the decision in the cases referred to. The list of subjects showed that the committee did not consider the scheme limited by 52 & 53 Vict. c. 76, sect. 8, and it might comprise any subjects. Though the fees might be in fact small, they were not necessarily so, and there was no binding dedication of the amount realized to public or charitable purposes: *The Glasnevin Cemetery Case* (4). There were a number of similar technical schools, so this case was of general importance.

I was of opinion (the Recorder continued) that the case was governed by *The Belfast Harbour Case* (2), and *The Sligo Harbour Case* (3), somewhat extending the law laid down in *The Londonderry Bridge Case* (1), and as I had not found anything in the functions of the schools except what is prescribed by statute in giving technical education, I directed the Commissioner of Valuation to amend the valuation lists by distinguishing the premises

(1) I. R. 2 C. L. 577.
(2) [1897] 2 I. R. 516.
(3) [1899] 2 I. R. 214.
(4) [1897] 2 I. R. 157.

therein as being of a public nature, and used exclusively for public purposes. I think these late decisions established these two propositions—(1) that hereditaments may be held for exclusive public purposes within the meaning of our valuation code, though the operations carried on are not in fact enjoyed by the whole community, but only by sections of them, if the general object be for the benefit of all, and the advantages held out be open to all the community who elect to take advantage of them, and be not confined to any class, and if the whole income be devotable to the public purpose or trust, and not to any alien or collateral purpose; and (2) that the fact that portion of the income is raised by fees or charges, on which ground alone many of the old cases held that the exemption was taken completely away, does not take away the exemption if the funds thus raised are all dedicated to the main public purpose. The revenues raised by the dues paid by private merchants in harbour cases are often very large indeed. In this case the technical schools are established under public Acts of Parliament devised by the Legislature to meet the great public demand for technical education throughout the kingdom at large, now deemed so necessary to meet the industrial requirements of the age. They are, I understand, open to all who choose to enter them; and it was distinctly stated during the argument, and not controverted, that the pupils were not trained or instructed for any special trade, but in the general scientific and technical instruction given in all such public schools. They may teach typewriting or book-keeping, or other subjects most useful to an artizan, but so might and do many of the public elementary schools. If the classes were formed to qualify for special trades or professions exclusively, it might fairly be contended that the instruction was for special classes, and not for exclusively public purposes, as I held in the Benchers and the Incorporated Law Society cases many years ago.

The question for the Court is:—Whether my decision is right in point of law, or, if not, what should be done in the premises?

Henry, K.C., and *Hunt*, for the Pembroke Urban District Council.

Vesey Fitzgerald, for the Commissioner of Valuation.

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The arguments were the same as before the Recorder. The *Guardians of the Waterford Union* v. *Barton* (1) was also referred to.

LORD O'BRIEN, L.C.J.:—

The question in this case is whether the Pembroke Technical School (Ball's Bridge branch) is exempt from rateability—whether, in fact, it is an institution altogether of a public nature, and used exclusively for public purposes. If it be an institution of this character, it is, under the provision of the Poor Law Act and Valuation Act, exempt from rateability: see *Londonderry Bridge Case* (2), *The Belfast Harbour Case* (3), and *The Sligo Harbour Case* (4). In deciding the question we have to determine, we must regard the origin and the object of the institution, the means by which it is maintained, and its use. The material facts connected with it are set forth in the case stated for our determination by the Recorder of Dublin, and are as follows:—

"The site of the Ball's Bridge Technical School, together with the yard adjoining, is held by the Pembroke Urban District Council from the Earl of Pembroke under an agreement for a lease (which has since been executed) at the yearly rent of five pounds and one shilling.

"The school is a new building of corrugated iron, and was erected by the Pembroke Urban District Council in 1902 at a cost of nine hundred and thirty pounds. The Technical Instruction Committee of the Pembroke Urban District Council occupy it and the adjoining yard, without payment, for the purpose of a technical school.

"The composition of the Technical Instruction Committee is as follows:—Thirty-one members, of whom nine are members of the Pembroke Urban District Council, four are ladies, and the remainder is made up of representative clergy of the different denominations, of representatives of trades or industries, and of others interested in technical instruction, some of whom reside outside the district.

"Mr. Charles P. Coote Cummins, Secretary of the Technical

(1) [1896] 2 I. R. 538.
(2) I. R. 2 C. L. 577.
(3) [1897] 2 I. R. 516.
(4) [1899] 2 I. R. 214.

Instruction Committee, examined for the appellants, deposed that:—"The Ball's Bridge School is a branch of the Pembroke Technical School, Ringsend, which was established under the Technical Instruction Acts, 1889–1891. Pursuant to these Acts the Urban District Council of Pembroke, as the local authority, assess a rate of one penny in the pound on the rateable value of the district in aid of the technical or manual instruction in the schools. The rate last year realized four hundred and sixty-one pounds, about one-fourth of which was expended for Ball's Bridge School. The Department of Agriculture and Technical Instruction, administering under these Acts the Parliamentary grants in aid of technical instruction, contribute one thousand pounds a year to the school, besides four hundred and thirty-nine pounds per annum from what is known as the 'Equivalent Grants' fund. Both schools are under the same Committee of Technical Instruction. The Ball's Bridge branch is under the general direction and supervision of the principal of the Ringsend School, and is carried on, as far as found possible, by the teachers already conducting classes at that school. The Ringsend School is distinguished in the valuation lists as a tenement of a public nature, exempt from assessment, and has never been rated.

"The Committee of Technical Instruction form a scheme prescribing the subjects taught at each school respectively. The scheme is subject to the approval of the Department of Agriculture and Technical Instruction, and such approval was duly obtained for the existing scheme, viz.:—

"The Pembroke Technical Instruction Scheme for the session 1902–1903 comprised—(1) instruction at the Pembroke Technical School, Ringsend, in the following subjects: mathematics, mechanics, magnetism and electricity, machine construction and drawing, naval architecture, drawing (freehand, geometrical, and design), carpentry and joinery, steam, electrical engineering, mechanical engineering, metal working, workshop arithmetic, commercial arithmetic, commercial correspondence, shorthand, type-writing, cookery, laundry work, dressmaking, machine knitting; (2) a branch evening technical school at Ball's Bridge, in which classes were held in book-keeping, business methods, shorthand, typewriting, drawing (including freehand, geometrical, and

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design), manual instruction, elementary mechanics, mensuration, cookery, dressmaking, laundry work, and needlework.

"Under the Pembroke Technical Instruction Scheme for the session 1903–1904 provision is made at Ringsend for instruction in the following subjects: mathematics, applied art, mechanical and electrical engineering, manual instruction in wood and metal, carpentry, naval architecture, shorthand, typewriting, cookery, laundry work, dressmaking, needlework, and machine-knitting; and for the following subjects at Ball's Bridge: mathematics, mechanics, mensuration, applied art, manual instruction in wood, book-keeping, shorthand, typewriting, cookery, laundry work, dressmaking, and needlework.

"The technical or manual instruction given in the schools does not qualify the pupils to practise any branch of handicraft, but is of an educational or preparatory training in the principles of certain arts and sciences and their application to specific trades and industries.

"The session lasts about twenty-six weeks. As a rule a fee of two shillings and sixpence per head per annum is charged, but payment is not compulsory, or at any rate exacted in every case. The amount of fees received at the Ball's Bridge School for the session 1902–1903 was about twenty-eight pounds or thirty pounds, which was expended in providing light and fuel for the school and in cleaning the school windows. The teachers do not participate in the school fees, but are paid exclusively from the public moneys derived from the Parliamentary grants or the rates. The cost of the teaching staff last year was about two hundred and ninety pounds. There is no private profit derived from the schools, and the Committee of Technical Instruction have no beneficial interest whatever. The accounts are audited by the Local Government Board auditor.

"The pupils are chiefly from the district, but both schools are open to all comers without exception, irrespectively of residence, whether within or without the district, and in Ball's Bridge School there are pupils who come from outside the district."

These are the material facts connected with the Pembroke Technical School, and what do they establish? They establish, in my opinion, the following propositions:—1. That the fabric of

the institution was constructed by means of public money in order that it might be a school for technical instruction. 2. That the institution is maintained by public money, raisable as a tax by statute, and supplemented by money provided by Parliamentary grants. 3. That the Committee of Technical Instruction have no beneficial interest whatever in the premises—that there is no private profit derived from the school. 4. That the schools are open to all comers, without limitation of class, locality, or creed. 5. That in obedience to statutable injunction there are no handicrafts as such taught in the school. 6. That the teachers are paid out of public money exclusively. 7. That the character of the subjects taught, taken as a whole, indicates a great public purpose, the preparing and developing of the youthful mind for success in many departments of the business of life, for success in the application of the sciences, for success in commerce, and indeed in almost every form of industrial enterprise, matters not alone of personal and local, but emphatically of national and imperial interest. There can be no doubt technical instruction assists and promotes progress in all that pertains to industrial enterprise, whether viewed from the standpoint of commerce or agriculture or manufactures. Many assert that in all that belongs to industrial enterprise and the application of the sciences, Germany and America have outstepped Great Britain in recent years, and ascribe this alleged result to the more numerous and better equipped establishments for technical instruction which are to be found in these countries. However, whatever opinion may be derived from international comparisons, I am satisfied that, regarding its origin and objects, the manner of its maintenance and its use, the Pembroke Technical School is an institution of altogether a public nature, and used exclusively for a public purpose, and accordingly exempt from rateability. Three main arguments have been advanced against the view I have taken. It is said that because a fee of 2*s.* 6*d.* is sometimes charged on admission, this deprives the institution of its public character, and renders the institution one of not altogether a public nature, and the case of *The Guardians of the Waterford Union* v. *Barton and others* (1) was

(1) [1896] 2 I. R. 538.

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cited. This case is plainly distinguishable. The charge of 2*s.* 6*d.* for admission, as appears from a memorandum to which, by consent of both parties, we were referred, was made to secure the attendance of *bona fide* and serious students, and for the purpose of excluding those who would only delay and embarrass progress by curiosity or idleness and thwart the purpose of the institution—it was, in fact, imposed to make the administration of the public trust for educational purposes more effective. The money realized, small in itself, was applied, and must be applied, to the source from which it came. It was produced by the public trust, and must go back to, and be applied for the benefit of, that trust. The fact that there is in the present case, as I am of opinion there is, a clear obligatory trust to apply the fees in question for the benefit of the institution, distinguishes the case from that of *The Waterford Union* v. *Barton* (1). The facts of that case and the point of the decision are clearly set forth in the head note to the report of the case. The head note is as follows :—"A parcel of land with buildings thereon was in the occupation of certain members of a Roman Catholic religious community, bound by a vow of poverty, and obliged by their rules to pay into the coffers of the community all proceeds derived from teaching after feeding and clothing themselves, which proceeds were applied for the purposes of education. The buildings consisted of a college, built at the expense of the community out of their own funds, for the training of young persons to become National teachers. Of these a certain number were admitted, subject to the sanction of the Commissioners of National Education, and supported and educated wholly out of a grant of £50 for each person made by the Government, and sums received from the Government as rewards for proficiency. Besides these, certain pupils were admitted at a yearly fee of £50 each, for the purpose of being prepared to receive the sanction of the Commissioners of National Education, and thereby to come upon the public endowment. These yearly fees were applied for their maintenance, and any surplus was carried to the credit of the Commissioners, but there was no obligation on the part of the community to do so :—Held, that, having regard to the admission

(1) [1896] 2 I. R. 538.

of pupils paying such yearly fees, the college was not used exclusively for charitable or public purposes, and was not altogether of a public nature, and was therefore not exempt from rating."

My Lord Chief Baron discusses the case of *The Queen* v. *Sterry* (1), and the case of *The Trustees of Magee College* v. *Commissioner of Valuation* (2), and referring to the latter case he says:—"In giving judgment O'Brien, J., says: 'It appears . . . that the education of the students is not altogether gratuitous, but in addition to the said £250 a year, payable out of the endowment fund, the professors are entitled to receive from the students, and the students are bound to pay them, certain fees, the amount of which does not appear to have been settled, but it is to be fixed from time to time by the General Assembly. It may happen that they would be fixed at such an amount as would constitute the greater part of the professors' salaries; but, whatever the amount may be, the result of the payments is that the institution would be supported partly by Mrs. Magee's legacy, and any further voluntary contributions, and partly by the students' fees, from which some profit would be derived; and the question of the right to exemption should not be affected by the proportion which the amount of the bequests and the voluntary contributions may bear to the amount contributed by the students.'"

Commenting upon this the Lord Chief Baron says:—"I concur in this portion of the judgment of Mr. Justice O'Brien, so far as it refers to a case such as that then before him, in which the sums payable by the students are not themselves bound by a charitable trust." Now, in this case I think the fees were clearly bound by a trust—a trust which made it obligatory on the committee to apply them for the benefit of the institution. The Chief Baron goes on:—"It was argued for the respondents that the principle of that case was not applicable to the present, because it is found that the sums paid by these paying pupils are applied for their maintenance, and if there be any surplus it is carried to the credit of the National Board. Now, had it appeared that under the rules of the National Board there was an *obligation* upon the managers of the college to bring to the credit of the National

(1) 12 A. & E. 84. (2) I. R. 4 C. L. 438.

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Board the profit, if any, which was derived from these paying pupils over and above their maintenance, a question would have arisen, upon which I do not express, and indeed have not formed, any opinion." Though my Lord Chief Baron says that he has not formed any opinion, I think, if I could view the recesses of his mind, I would find that if there were an obligatory trust he would have held that the charitable nature of this institution would have been preserved. I find that my brother Andrews, in his short and clear judgment at page 557, says:—"It also appears that the surplus balance of the receipts of the establishment is, as I understand the Case Stated, in effect credited to the Government grant; and I will assume, from what is stated in the case, that the entire surplus balance of the receipts of the establishment, including the amount received from the paying pupils, after providing for its outgoings and working expenses, is expended for its educational purposes, which I will also assume, without so deciding, to be in their character charitable purposes within the meaning of the Acts I have referred to; but the case does not find, and I have been unable to discover any evidence, that the community, or the managers of the establishment, are under any legal obligation so to expend the sums received from the paying pupils, and I am therefore of opinion that, as matters stood in 1895, and apparently still stand, the hereditaments and tenements which constitute the establishment in question are neither 'altogether of a public nature,' nor used exclusively for charitable purposes, so as to come within the statutory exemption, and therefore are not exempt from rateability in the year 1895." Now, here there was an obligatory trust to apply the money realized by these fees to the purposes of the institution.

Mr. Fitzgerald argued also that the benefit conferred by these schools was limited; that there was no universality of benefit, and that therefore the institution was not public in its nature or purposes. I cannot accept that proposition. The system, in my opinion, confers a very wide-reaching benefit. In my opinion these schools—for this is only one of a system, as was presented by Mr. Henry—confer a benefit on the entire community.

Another argument put forward by Mr. Fitzgerald was this:—He contended that if you take any one of these subjects of instruc-

tion by itself, it does not indicate any public purpose; that, taking an aggregation of these subjects of instruction, they do not make any result—an aggregation of nothings does not make a unit: *ex nihilo nihil fit.* I cannot accept that contention. The position is best described by a simile. A rope is composed of many strands. One strand may be very frail, suggestive of mere weakness, but when many strands are put together they constitute a rope which may indicate and possess great strength. So here these many subjects of instruction regarded together—the curriculum—constitute a system, and the system, in my opinion, indicates a general and most salutary public purpose.

On these grounds I am clearly of opinion that the view of the Recorder was right, and should be adopted by us.

ANDREWS, J.:—

The real question to be decided upon the Case Stated is, as I take it, whether the learned Recorder was right in point of law in his decision that the Pembroke Technical School (Ball's Bridge Branch) and the yard attached thereto ought to be distinguished by the Commissioner of Valuation in the valuation lists as being within the classes of hereditaments which are exempt from rateability under the 2nd section of the Act, 17 Vict. c. 8, taken in connexion and construed with the 16th section of the Act, 15 & 16 Vict. c. 63, and in my opinion the premises in question, which consist of the Technical School buildings and the yard attached thereto at Ball's Bridge, are so exempt, and ought to be distinguished in the valuation lists accordingly.

I entertain no doubt that the instruction given in this school (all of which comes within the definition of "technical instruction" in the 30th section of the Act, 62 & 63 Vict. c. 50) is "charitable" within the meaning of those Acts, and that a building exclusively used for giving such instruction would be so used for a "charitable purpose" within the meaning of the 2nd and 16th sections, which I have referred to; and if, on the true construction of those sections, it is necessary for the exemption of these premises from rateability to so determine, I am also of opinion that they are of a public nature, and used for public purposes. As regards the instruction which is given being "charitable," I do not think it necessary to do

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more than refer to the judgment of the Lord Chief Baron at pages 546 and 547 of the report of the case of *The Guardians of the Waterford Union* v. *The Commissioner of Valuation and Others* (1). I am unable to accept the view presented during the argument by Mr. Vesey Fitzgerald, on behalf of the Commissioner of Valuation, that the scope of the instruction (although very wide) being limited, as it is, prevents it from being of a public or "charitable" character within the meaning of the Valuation Acts. It appears from the Case Stated that although the pupils are chiefly from the district, the school is open to all comers, without exception, and that some of the pupils are from outside the district. I think, if it be necessary to so decide, that the public character of the instruction is apparent, and if it be necessary to consider the 63rd section of the Act, 1 & 2 Vict. c. 56, I also think that, subject to the question respecting the fees which are taken from pupils, and to which I shall next advert, the premises are dedicated to a public purpose within the meaning of that section. The case states that no private profit is derived from the school, and that the Committee of Technical Instruction have no beneficial interest in it whatever.

With respect to the fees, the case states that as a rule a fee of 2*s.* 6*d.* per head per annum is charged, but payment is not compulsory, or at any rate exacted in every case. The proceeds are expended in providing light and fuel for the school and in cleaning the school windows. The teachers do not participate in the school fees, but are paid exclusively from the public moneys derived from the Parliamentary grants or the rates. During the argument we thought it desirable to obtain some further information respecting these fees, and accordingly we were furnished with a memorandum, dated 16th December, 1903, from Mr. R. Blair, the Assistant Secretary, in respect of technical instruction of the Department of Agriculture and Technical Instruction for Ireland, and it was agreed on both sides that we were to be at liberty to use this memorandum as if the facts stated in it had been stated in the case. From this memorandum it appears that the Governors of the Pembroke Technical Schools (*i.e.* the school at Ringsend

(1) [1896] 2 I. R. 538.

and the school at Ball's Bridge) are not required by the Educational Endowment Scheme (No. 149), nor by the Technical Instruction Acts of 1889 and 1891, and the Agriculture and Technical Instruction (Ireland) Act, 1899, to charge fees for admission to classes. The scheme of technical instruction approved of by the Department under section 19 (4) (*a*) of this Act presumes that fees will be charged, and applied towards the maintenance of the schools. The estimated amount to be raised in this way (£50 out of a total estimated expenditure of £2000) does not, however, represent a charge for instruction, and the exacting of a fee is intended only as a means of keeping other than serious students from applying for admission to the classes.

I am of opinion that the fees so charged can only be applied (as they are) for the school purposes, and that the receipt of these fees (which constitute a part of the school income) in no way prevents the premises in question from being, as in my opinion they are, "used exclusively for charitable purposes" or "for public purposes" so as to entitle them to the exemption from rateability which is claimed for them, and to be distinguished in the valuation lists accordingly. The fees charged and received from certain of the pupils at the educational establishment under consideration in the case of *The Guardians of the Waterford Union* (1), already referred to, were of a different character, the managers of that establishment not having been under any legal obligation to expend them for the educational purposes of that establishment, and the fees paid to the professors by the pupils of the Magee College, referred to in the case of *The Trustees of the Magee College* v. *The Commissioner of Valuation* (2), were also of a different character. The result of my opinion, therefore, is that what I take to have been the decision of the learned Recorder in this case was right in point of law, and that the school premises in question in this case are entitled to the exemption from rateability claimed for them, and should be distinguished in the valuation lists accordingly, as it appears the premises of the Ringsend School have been.

(1) [1896] 2 I. R. 538. (2) I. R. 4 C. L. 438.

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GIBSON, J. :—

The first objection against the Recorder's decision is that the school programme relates to special instruction, in which only a section of the community can have an interest, and that the purpose cannot therefore be properly described as public. Parliament, however, dealt with such instruction, which is of vital importance to general mercantile interests, as a matter of National concern, and the teaching, though in a sense special, serves the country generally quite as much as Derry Bridge or Belfast Harbour.

A further objection was that the programme, as to some of its subjects, referred to the practice of trades, and was therefore outside the scope of the Technical Instruction Acts. The Recorder held otherwise; and looking at the definition in the statutes, I concur in his view. It may be difficult to draw the line between general instruction and practical instruction in relation to technical subjects, but there is nothing to show that the distinction has been disregarded in the programme.

The chief objection is that there was a nominal charge of 2*s.* 6*d.* for most classes for the session of twenty-six weeks, and it is said that the exaction and application of these fees were in the discretion of the committee. The fees do not properly represent a charge for instruction, but are sanctioned for the purpose of excluding persons other than serious students; they are authorized by the scheme approved of by the Department, under the Act of 1899, c. 50, sect. 19, sub-sect. 4 (*a*); they are included in the annual estimate prescribed by the scheme; they are appropriated for school purposes, and any other application would be a breach of trust. The case is therefore governed by the Belfast and Sligo cases.

The Recorder's decision must be affirmed. As the system of instruction is founded on statute, and is maintained out of public funds, I think that the purposes are more appropriately described as public than as charitable, though the latter description may also be applicable.

Solicitors for the Pembroke Urban District Council: *D. & T. Fitzgerald.*

Solicitor for the Commissioner of Valuation: *Sir Patrick Coll.*

J. L.

BUTLER *v.* M'ALPINE (1).

(1903. No. 746.)

K. B. Div. 1903. Nov. 24, 25, 27. Appeal. 1904. Feb. 4, 5, 15.

Ship—Damage—Wharf in tidal river—Obstruction in bed of river—Injury to barge hired by wharfowner to deliver cargo at wharf—Negligence—Liability of wharfowner.

The defendants, who were lessees of a wharf in a tidal river, hired a barge of the plaintiff to carry goods to the wharf at a place where the barge must necessarily ground at low water. The defendants had no control over the bed of the river. A block of hardened cement had fallen off the quay into the river; it was visible at low water, but its existence was not known to the defendants. The plaintiff's barge, while alongside the wharf for the purpose of discharging its cargo, grounded on the block of cement when the tide fell, and was injured. In an action for damages for the injury:—

Held (by Andrews and Gibson, JJ.; *dissentiente* Lord O'Brien, L.C.J.), that the defendants, having invited the plaintiff to discharge the goods at the wharf, were bound to take reasonable care to ascertain that the berthage was reasonably safe, and, not having discharged this duty, were liable for the injury.

Held (by FitzGibbon and Walker, L.JJ.; *dissentiente* Holmes, L.J.), that the decision of the King's Bench Division should be affirmed.

The decision in *The Moorcock* (14 P. D. 64) adopted.

MOTION to set aside verdict and judgment for plaintiff and enter verdict for defendants, or for a new trial.

The action was brought for damages for the negligence of the defendants, whereby a barge, the property of the plaintiff, was sunk and injured.

The defendants were railway contractors, who were engaged in constructing a railway from Rosslare, in the county of Wexford, to Waterford, and about eight miles from Waterford they were building a bridge over the river Barrow. About ten miles from Waterford there is an inlet from the river Barrow, on the Wexford side, at the head of which is Campile; the river there is tidal.

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and ANDREWS and GIBSON, JJ.

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A shopkeeper at Campile, named Kenny, had constructed a quay on the shore there, about ten years ago, with the permission of the Admiralty, and the Board of Trade approved of his plan; he had also built some stores. The sea wall in front of the quay was of coarse rubble, not coped, not quite perpendicular; the quay sloping back from the river. It was the practice of persons on board lighters to shove them off from the quay front as the tide fell, to prevent them grounding on the front of the sea wall. The quay wall was about 120 feet long, built on the foreshore, and it practically ran out to low water; there was a considerable slope towards the river from the stores on the quay. The space between the stores on the quay and the top of the sea wall averaged about 12 feet; the surface was not quite even. The store on the quay was about 60 long by 20 feet wide, and was used by the defendants for storing cement.

The defendants took the wharf from Kenny on the following agreement:—

> "We agree to take from you, and you agree to let us, for, say, three years, from the 1st July, 1901, the portions of your wharf at Campile on which our cement shed is situated, with access thereto, and also the use of the wharf for discharging and loading; rent to be £5 per annum."

The defendants subsequently built up the point of the quay, which before had been only a sloping bank of earth.

In September, 1902, the defendants hired for £4 the plaintiff's barge, a flat-bottomed boat, to deliver 40 tons of cargo, consisting of 2 girders, weighing 7 tons 15 cwt. each, and a quantity of coal. The girders were to be delivered at Belvue, and the remainder of the cargo at Campile. The barge was loaded out of a steamer at Waterford, and arrived at Campile off the quay on Friday evening, 5th September, in charge of plaintiff's bargeman, Meyler, who, not being able to "fit in" because another boat was delivering at his berth, ran the barge across to the opposite side of the river. About 7 a.m. next morning, Meyler moved across the river at high water, and went into the berth the other boat had left. The latter boat was round-bottomed, and smaller than plaintiff's. Meyler had to wait for an hour and a half, as the gang of

men discharging his boat went to discharge another. At about 8.30 a.m. he heard a rush of water into the boat. It appeared that when the tide fell the boat had settled down on a block of hardened cement lying on the bed of the river, and that this had come through the bottom of the boat. Meyler had often been in this berth before at all states of the tide, and had often examined it at low water. He had been there about ten days before, and he stated in his evidence that it was then a safe, fair berth. He said it was usual to boom off a boat with poles as the tide fell, so that she should not take the ground too close to the quay front, and that on the morning in question he had poled the barge off. No one used the quay to his knowledge except defendants.

The defendants' manager, Munro, stated that the place in question was a regular berth for discharge. That the practice was for the crews of lighters discharging there to wait in the boat till she was aground. They moored immediately alongside the quay; if the tide was falling, they slackened their ropes and "boomed" out. He never saw the piece of cement in the river. Quantities of cement were discharged at the quay. He stated that the storekeeper, Ivors, looked after the quay, and that it was partly Ivors's business to see that nothing fell off the quay into the berth; it was his (Ivors's) duty to see the berth clear, but was no part of Munro's duty.

Ivors, the defendants' storekeeper, stated in his evidence: "If coal or a bag of cement falls overboard, I have to go down and take it out. I never remove anything out of the berth except what falls overboard or off the quay, and that is if it is of use to M'Alpine. I had not seen this block of cement before the accident. I saw it some days after she left the berth . . . about half an inch of it was visible at low water . . . . I took it out. It was just a piece of cement that had broken off a bag of cement about one foot square; it had got damaged before it fell off the quay. I am nearly sure of that, because it could not harden in the water. From my experience there I would say it fell off the quay . . . it was about half a foot or a foot from the mud at foot of the wall, about one foot or one foot and a quarter from the wall."

The action was tried before Johnson, J., and a common jury at the Summer Assizes, 1903, at Waterford. In summing up, his

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Lordship read the following note to the jury :—"The quay was in possession of the defendants under an existing letting—they constructed the frontage of the quay to the river for the purpose of barges (in the usual mode of navigation) discharging there. They ordered this barge to deliver her cargo for them at this quay; they were therefore bound to take reasonable care that the berth at their quay to which they ordered her was reasonably fit and safe for that purpose. The defendants knew that this barge would ground there at low water. The obstruction was not any natural condition of the river bed, but was an unusual and artificial obstruction—a hard piece of cement about a foot square—such cement as they had on their quay. Did they use reasonable care to ascertain that the berth was reasonably fit and safe for the barge to lie and discharge there? They were on the spot, and had means of ascertaining whether the berth was reasonably fit and safe for the barge which they ordered to come there, better than the persons navigating the barge had. There is evidence that the berth was foul." The Judge told the jury to assess—(1) the amount of reasonable cost of repairing the barge; and (2) the loss to the plaintiff while the barge was useless to him by reason of the injury to her.

The following were the questions left to the jury, and their answers :—

1. Was the injury occasioned by the barge grounding on the block of cement? Yes.

Or by grounding on the slope of the quay front wall? Not answered.

2. Did the barge berth at the place in question by direction of the defendants by their servants? Yes.

3. Was that berth reasonably fit and safe for that purpose? No.

4. Did the defendants by their servants take reasonable care to ascertain that the berth was reasonably fit and safe for the barge? No.

5. Could the defendants by their servants with reasonable care and skill have removed the cement and made the berth safe? Yes.

6. Was the injury occasioned solely by want of ordinary care and maritime skill of those on board the barge? No.

7. If the barge grounded on the block of hard cement, could those on board the barge have avoided it by ordinary care and maritime skill? No.

The jury assessed the damages at £43, being £25 for the repair of the barge, and £18 for loss of time while the barge was useless, and judgment was entered for the plaintiff for £43 with costs.

The defendants now moved to set aside the verdict given and judgment entered for the plaintiff, and to enter a verdict for the defendants, or in the alternative for a new trial.

Cherry, K.C. (with him *Battersby*), for the defendants:—

We submit that as the berth was not in the defendants' possession or control, they are not under any duty to the plaintiff to see that it is safe. The case of *The Moorcock* (1) is distinguishable; the defendants there were wharfingers, and the contract was for the letting of the wharf, by which they made a profit. The element of making profit from the wharf is material: *Curling* v. *Wood* (2). In the present case no profit was made by the defendants from the use of the wharf, the contract was merely one of carriage; the defendants were in the position of gratuitous lenders of the use of the wharf, and as they did not know of the unsafe condition of the berth, they are not liable: *M'Carthy* v. *Young* (3); *Blakemore* v. *Bristol and Exeter Railway Company* (4). If I order goods to be sent to my house, and the person delivering them, or the vehicle in which they are delivered, is injured owing to the defective condition of the highway, could it be contended that I was liable? Lord Esher, in his judgment in *The Moorcock* (1), states that that case goes a step beyond any of the cases. To hold the defendants liable here would be going a step further still. Where is the liability to end? If the defendants are liable for injury arising from the condition of the berth, they would be equally liable if it arose from an obstruction anywhere in the bed

(1) 14 P. D. 64.
(2) 16 M. & W. 628.
(3) 6 H. & N. 329.
(4) 8 E. & B. 1035.

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of the river on the course of the voyage. In *The Calliope* (1) the decision of the Court of Appeal was based on the assumption, which turned out to be erroneous, that the defendants were lessees of the river bed. The decision in the House of Lords was in favour of the defendants, although on a ground not material to the present case; but the judgments of Lord Halsbury and Lord Herschell go to show that they thought knowledge by the wharf-owner of the obstruction necessary to render him liable. [He also referred to Pollock on Torts, 6th ed., pp. 494, 5; *Francis* v. *Cockrell* (2).]

Carrigan and *Daniel J. O'Brien*, for the plaintiff:—

The present case cannot be distinguished from that of *The Moorcock* (3). It is argued that the defendants here are not wharfingers, since they do not let their wharf for hire; but a wharfinger simply means a person who owns a wharf. The fact that the contract here was for the carriage of goods to the wharf, and not for the use of the wharf, is immaterial. The defendants must be taken to have invited the plaintiff to use the berth, and the principle of *The Moorcock* (3) is that a wharfowner who invites a person to come to a particular berth is bound to take reasonable care to ascertain that it is in a reasonably safe condition. In *The Calliope* (1) there was no letting of the wharf, yet it is plain from the judgments of the Lords that they were of opinion that if the injury had been due to the defective condition of the berth, the defendants would have been liable, on the principle of *The Moorcock* (3), which case they evidently considered to have been well decided. The law as to liability for the defective condition of a highway can have no application to the present case.

Battersby, in reply, referred to Bigelow on Torts, pp. 704, 705; *Carleton* v. *Franconia Iron Co.* (4).

Cur. adv. vult.

(1) 14 P. D. 138; [1891] A. C. 11.
(2) L. R. 5 Q. D. 184, 501.
(3) 14 P. D. 64.
(4) 99 Mass. 216.

GIBSON, J. :—

Previous to *The Moorcock* (1) there was no decision that an owner could be made liable for injuries sustained by persons invited to deliver goods at his premises in consequence of the approach outside *in alieno solo* being dangerous or in bad repair. If the immediate approach was dangerous to the knowledge of the owner, he might be bound to warn any person invited to the premises whom he believed would be ignorant of the danger, on the same principle that the seller or lender of a dangerous chattel is required to caution a person taking it in presumable ignorance of the danger. But this liability would depend on *scienter* founding a duty. The principle of *The Moorcock* (1) and *The Calliope* (2) is, that the owner of a wharf, whether by implied contract or implied duty, is under an obligation to anyone invited by him to discharge goods for him or for his profit at the wharf, to take reasonable care to ascertain and ensure that the berthage of the wharf is reasonably safe for the vessel invited to lie at the wharf. The wharfowner is a riparian owner, whose position gives him a peculiar use of the adjacent *solum*. He is in a better position to know the state of the berth than the person using it by his invitation, who may be ignorant of, and have no opportunity of discovering, any hidden danger. The principle does not depend on the wharfowner carrying on the business of wharfinger, or receiving any separate payment for the use of the wharf or berthage. In *The Calliope* (2) the defendant was not a wharfinger, but a wharfowner, who, being indorsee of a bill of lading, directed the Calliope to discharge at his wharf. It was obviously the view of the Law Lords that he would have been liable if the misfortune had occurred in the berth next the wharf, and such berth was then dangerous by reason of defendant's negligent default in not removing a foreign obstruction. *The Moorcock* (1) was not questioned. The present case clearly comes within the principle. The facts are, indeed, stronger than in *The Moorcock* (1). From the sloping character of the wharf, things from time to time fell off the wharf (as apparently this cement did), and it was admittedly part of the ordinary duties of the defendants' servant to clear the berth of

(1) 14 P. D. 64. (2) [1891] A. C. 11.

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such obstructions. There was no payment for the use of the berth or wharf, but the wharf was necessary for discharge under the contract, and it would be useless without the berth. Though the defendant was not lessee of the soil of the wharf, he had the use of it for discharging and loading; he built part of it; and he was in *de facto* occupation and control of the wharf when the barge arrived.

The Moorcock (1) principle is confined, in my opinion, to the peculiar relations of wharfowner and shipowner in water transit, and would not extend to land carriage on public roads and streets, as to which (in the absence of *scienter*) the owner would not be responsible for the condition of the approach leading to, but not on, his premises. Everyone using a highway has to look out for himself. A frontager's use of the highway is not like the use of a wharf berthage; there are usually no peculiar concealed dangers which would be more likely to be known to him than to those coming to his premises.

If the cement fell into the berth by the defendants' negligence, the defendants would have been unquestionably liable; but as this case was not made or put to the jury, I need not consider it.

ANDREWS, J.:—

This was an action for damages sustained by the plaintiff from injury to his barge occasioned by alleged negligence on the part of the defendants.

By a contract in writing between the defendants and John Kenny, who, with the permission of the Admiralty, had constructed a quay or wharf on the foreshore at Campile, Kenny let to the defendants for three years, from the 1st July, 1901, the portion of the wharf on which the defendants had erected a cement shed, with access thereto, and also the use of the wharf for discharging and loading.

The defendants, who were contractors for railway work, in September, 1902, contracted with the plaintiff to carry for them in his barge, for a freight of £4, a quantity of materials and

(1) 14 P. D. 64.

goods, weighing between 50 and 60 tons, from Waterford, part to be delivered at Belvue and the remainder at Campile.

The delivery at Campile was manifestly to be made at the quay I have referred to. Owing to the construction of the quay, objects were liable to fall or roll off it into the berth-space alongside of it, which was the regular berth-space for barges to lie in, and was necessary for them to lie in when discharging or loading at the quay. The bed and soil of the berth-space was not vested in either Kenny or the defendants, but they were entitled to use it, as necessary to give access to the quay, in order to load or discharge there.

The defendants were also entitled to remove from the berth-space any objects which might fall into it from the quay. A block of hardened cement had in fact, but without the knowledge of either the plaintiff or the defendants, fallen into the berth-space, and rendered it dangerous for a flat-bottomed barge, such as the plaintiff's, which, as the defendants knew, must, when lying in the berth-space, ground at low water.

The barge, while lying in the berth-space alongside the quay, and before all the cargo was discharged, settled down at low water on the block of cement, and was thereby injured.

There was no negligence on the plaintiff's part, and no blame attached to him in relation to this injury.

The defendants, who were on the spot, and had better means than the plaintiff had of ascertaining whether the berth was reasonably safe for a barge such as the plaintiff's to lie in and discharge cargo at, and who, on previous occasions, had removed from the berth objects which had fallen into it when of use to themselves, and who, after the injury to the barge, removed the block of cement, had done nothing before the injury was occasioned to ascertain whether the berth was in a reasonably safe condition. Munro, the defendants' manager, stated in his evidence at the trial that the defendants' storekeeper (Ivors) looked after the quay, and that it was partly his business to see that nothing fell off the quay into the berth, and that the berth was kept clear. Ivors, in his evidence, said that he removed the block out of the berth, and that, from his experience there, he would say it fell off the quay. The defendants had quantities of

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cement stored and stacked on the quay, and if a bag of cement got wet there, the cement would harden. Ivors said that the block was a piece of cement which had broken off a bag of cement which had got damaged before it fell off the quay.

The jury found that the injury to the barge was occasioned by its grounding on the block of cement; that the barge berthed at the place in question by direction of the defendants (it certainly did so at their implied request at the least); that the berth was not reasonably fit and safe for that purpose; that the defendants did not take reasonable care to ascertain that the berth was reasonably fit and safe for the barge; that the defendants could, with reasonable care and skill, have removed the cement and made the berth safe; that the injury was not occasioned solely by want of ordinary care and maritime skill of those on board the barge; and that those on board the barge could not have avoided its grounding on the block of cement by ordinary care and maritime skill; and they assessed the plaintiff's damages at £43.

It will be observed that the plaintiff came to the berth with his barge, not as a stranger or volunteer, but, if not by express direction, at least at the implied request of the defendants, and in fulfilment of his contract with them.

Under these circumstances, and having regard to the judgments of the Lords Justices in the case of *The Moorcock* (1), and of the Lords in the case of *The Calliope* (2), which were so fully referred to in the course of the arguments before us, I think we are bound to hold that there was, under the circumstances, an implied duty on the part of the defendants to the plaintiff to take reasonable care to ascertain that the berth which, in order to fulfil his contract with them, he would necessarily occupy at the quay, was reasonably safe for the barge to lie in, with cargo aboard, and to ground in at low water; and as the defendants took no steps to discharge this duty, and the injury was caused by the dangerous condition of the berth, I do not think that the verdict for the plaintiff ought to be disturbed, and the defendants' motion to set it aside ought, therefore, to be refused. The decision in the case of *The Moorcock* (1) admittedly went further than any previous

(1) 14 P. D. 64. (2) [1891] A. C. 11.

decision, and I do not regard it as legitimate to extend it; but it was referred to in the House of Lords in the case of *The Calliope* (1), when it not only met with no expression of disapproval, but seems to have been accepted as a sound decision.

The use of the berth in question was a necessary incident to the use of the quay, to which the defendants were entitled, and the plaintiff was, at their request, and in fulfilment of his contract with them, entitled, if not bound, to use the berth for his barge in the manner in which he used it; and, in so far as relates to the defendants' implied duty, I think that the berth must be regarded as an adjunct to the quay, the use of which was necessary in order to enable the plaintiff to discharge at the quay, and that the implied duty I have referred to in reference to the berth on the part of the defendants was practically the same as if the bed and soil of it had been vested in them. Lord Watson, in giving judgment in the case of *The Calliope* (1), at page 21 of the report, said:—"The appellant Company are neither owners nor lessees of the foreshore upon which their wharf abuts; they have no right except as members of the public, although their position as occupiers of riparian land gives them a use of the river and its adjacent *solum*, for the purpose of loading and unloading craft, which members of the public cannot enjoy without their permission." This seems to me to treat the berth for loading and unloading at the wharf in that case as an adjunct to the wharf, as I think the berth in question must be treated in the present case. I do not think it material that the defendants were not wharfingers, having regard to the facts and circumstances of this case, which I have referred to, and I only wish to add that I am not to be taken as suggesting, much less holding, that the decision in the case of *The Moorcock* (2), or the decision in this case, could be applied to a case of carriage by land, for delivery on land. Both decisions are in cases of carriage by water over a water highway, and neither is a general decision applicable to any other or different case of carriage.

(1) [1891] A. C. 11. (2) 14 P. D. 64.

K. B. Div. 1903.

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LORD O'BRIEN, L.C.J.:—

I regret that I cannot agree with my brethren. It seems that a piece of cement knocked a hole in the bottom of this vessel, and that the jury gave so much damages as caused her to spring into renewed existence. According to even the plaintiff's admission, she was "very old, 50 or 60 years old," and according to Hennessy, one of the witnesses, she made water when the girders were put in. He was called out of bed by the watchman to bail her out, and refused to sail in her. One of the witnesses for the defendants swore that the timber that was injured was rotten, and the age of the vessel would indicate that this was true. He also swore that it would cost only 30*s.* to repair the injury done by the cement, but the Waterford jury provided what was a practically new boat for the plaintiff, at the expense of the Scotch defendants.

For my own part I am not satisfied that there was any sufficient or adequate poling off from the quay. However, I turn to the general facts of the case. Looking at the contract of letting to the defendants, it appears quite clear that nothing was let but the wharf. The place where the accident happened was in the bed of the river below low-water mark, and in my judgment neither the property nor the possession was in the defendants, nor was the place in their occupation or under their control. There is indeed an expression used by one of the witnesses as to its being the duty of the defendants' storekeeper to see the berth clear; the meaning of that is distinctly stated by the storekeeper, Ivors. He says, "If coal or a bag of cement falls overboard, I have to go down and take it out. I never remove anything out of the berth except what falls overboard or off the quay, and that is if it is of use to M'Alpine." That is to say, that as between M'Alpine and himself he went down and recovered these things; but this does not imply any control over the place by the defendants.

With respect to this matter of things falling over, I wish to point out that there is no finding here that there was negligence on the part of the defendants in allowing this cement to fall into the water, and no question left to the jury as to this; and although the learned Judge who tried the case offered to put any other question which might be suggested, he was not asked to put any other question than those he left to the jury. I am careful not to

fix responsibility on defendants on a basis that has not been established. It is only right to the plaintiff's counsel to say they did not make any such attempt. They relied on the judgments in the case of *The Moorcock* (1), and referred to some *dicta* in the speeches of the Lords in the case of *The Calliope* (2). I am of opinion that neither the judgments in the case of *The Moorcock* (1) nor the *dicta* referred to, when read *secundum subjectam materiem*, sustain their position.

The case then stands thus: no property in the *locus in quo*; no possession or occupation of the *locus in quo*; no control over the *locus in quo*; moreover, nothing dangerous in the *locus in quo* to the knowledge of the defendants. Upon these facts I am clearly of opinion that upon general principles of law, as recognised and administered before the case of *The Moorcock* (1), and upon the authorities previous to that case, there would be no responsibility upon the defendants.

In the American case of *Carleton* v. *Franconia Iron Company* (3) the law is thus stated, as appears from the note of the case given in Bigelow on Torts, p. 705: "Even if the wharf was not public but private, and the defendants had no title in the dock, and the concealed and dangerous obstacle was not created by them or by any human agency, they were still responsible for an injury occasioned by it to a vessel which they had induced for their own benefit to come to the wharf, and which, without negligence on the part of its owners, or their agents or servants, was put in a place apparently adapted to its reception, but known by the defendants to be unsafe." It is not alleged here that the defendants knew the place to be unsafe.

I now come to the much canvassed case of *The Moorcock* (1). That case has been appealed to by both sides; on behalf of the plaintiff as an absolute authority for him; on behalf of the defendants as a case which touched the utmost limit of liability, but distinguishable in its essential facts from the present. It was, undoubtedly, the case on which the learned Judge based his charge to the jury. I think that case is distinguishable from the present on its facts. In the first place, in that case the contract was with

(1) 14 P. D. 64. (2) [1891] A. C. 11. (3) 99 Mass. 216.

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wharfingers *qua* wharfingers, and the nature of the contract was different. Here it is a mere contract to carry goods from Waterford to Campile. There it was a contract for the use of a wharf, and it may have been reasonably enough implied as a term of such contract that everything immediately and essentially necessary for the use of the wharf should be reasonably safe. That case, as Lord Esher says, went a step beyond any of the other cases, and to hold that it governs this case would be, I think, to go a step further still. Lord Esher in his judgment says: "The use of their wharf involved the use of the river adjacent to the front of their wharf, for the owner of a vessel such as the 'Moorcock' could not use their wharf without mooring that vessel alongside the jetty. It is a necessary and immediate step to the earning profit by the use of the wharf that the vessel should be moored to the jetty." There he makes it an implied term of the contract that the berth should be reasonably safe. In this case there is no such express term, and, in my judgment, in a contract to carry goods from Waterford to Campile there is no implied contract that this place, which was not in the possession or under the control of the defendants, was safe. Lord Bowen says: "Now, what did each party in a case like this know? For if we are examining into their presumed intention we must examine into their minds as to what the transaction was. Both parties knew that this jetty was let out for hire." That was the subject-matter of the contract there, the letting out for hire of the jetty, and it may be that that involved that everything immediately accessory to the use of the jetty was safe. Later on Lord Bowen says: "No one can tell whether reasonable safety has been secured except themselves" (the defendants), "and I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe." There, in my judgment, lies the distinction. This is not the letting out of a jetty; it is a mere contract, as I have said, to carry from Waterford to Campile. Lord Bowen's exact words are carefully to be noted, "the berth, which is the essential part of the use of the jetty." That is what was let, and it may reasonably be that the subject-matter of the contract should be reasonably fit for the purpose of the letting.

In the concluding passage of his judgment in *The Moorcock Case* (1), Lord Esher is reported to have said: "I therefore think that the appellants broke their contract, and that they are liable to the respondent for the injury which his vessel sustained." I think that we would be going too far in holding that an express contract to carry goods from Waterford to Campile carried with it an implied contract that the bed of the river below low-water mark at Campile should be free from anything and everything calculated to cause damage. This may be so, but to hold that it is so is going, in my opinion, much further than any case yet has gone, and is certainly a step further than *The Moorcock Case* (2), which, according to Lord Esher, went a step further than any case theretofore decided. Lord Bowen said in the case of *The Moorcock* (3): "The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction, and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have." What was the intention in *The Moorcock Case* (2)? That there should be an effective use of that, the use of which was contracted for, namely, of this wharf, which use would not be effective if the condition of the berth did not permit of it. What was the intention here? That a cargo of coal should be carried from Waterford to Campile, which was in fact carried and discharged there. The case of *The Moorcock* (2), when critically examined, does not support the plaintiff's case.

I now come to the case of *The Calliope* (4), and at the outset I desire to point out that in that case there was judgment for the defendants—that the defendants won—and that the ground upon which they won was that the negligence of the plaintiffs' servants

(1) 14 P. D. 67
(2) *Ibid.* 64.
(3) *Ibid.* 68.
(4) 14 P. D. 138; [1891] A. C. 11.

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caused the injury there complained of. No doubt there are some *dicta* in the speeches of the Lords to which reference has been made. Lord Watson, referring to the judgments in the Court of Appeal, which were reversed in the House of Lords, says (1): "Their Lordships did not deal with any of the questions raised in the Court below, but rested their decision on the ground that the appellants were lessees of a portion of the river bed *ex adverso* of their wharf, including the space between the berths, and that they had failed in their duty to those in charge of the 'Calliope' by neglecting either to remove the ridge or to warn the 'Calliope' of its existence." Therefore the ground of decision in the Court of Appeal does not apply here, and the judgment of the Court of Appeal is rather an authority for the defendants. This appears the more clearly from the judgment of Lord Justice Lindley. He said (2): "The learned Judge in the Court below failed to attribute sufficient weight to the fact that the ship was injured by grounding on the ground of the defendants." He goes on to add—and to this I wish to draw particular attention—"That ground was uneven, and the defendants knew that it was liable to become uneven." In *The Calliope Case* (3) it is never to be lost sight of, especially with reference to some of the *dicta* in the speeches of the Lords, that the offending obstacle in that case was a recurrent ridge of mud which the defendants knew presented itself from time to time, and which their servants from time to time scraped down. And it is also to be borne in mind that it appeared that the captain of the "Calliope" received from one Griffith, a servant of the defendants, a distinct express direction or invitation to bring the vessel into the particular wharf (see statement of facts in *The Calliope Case* (4)). I think it well to point out these matters, having regard to some of the *dicta* in the judgments in the House of Lords in *The Calliope Case* (3). The existence of a recurrent ridge was known to the defendants, and what was alleged to be an express order was given.

I turn now to what Lord Halsbury says (5): "I cannot entertain a doubt, when I look at the form of the statement of claim as

(1) [1891] A. C. 23.
(2) 14 P. D. 142.
(3) [1891] A. C. 11.
(4) 14 P. D. 139.
(5) [1891] A. C. 13.

it originally stood, that the cause of action was originally founded upon the notion that this vessel was invited to a berth, in the strict and proper sense of that word, at which it was unfit for a vessel under any circumstances to lie, and that by reason of the inequality and unfitness of the berth, the vessel being brought there was strained and injured. If that had been the complexion of the case, I certainly entertain no doubt the law, as laid down in the earlier cases, and in the later case of *The Moorcock* (1), would have been applicable to that state of things." Now it cannot be said that this berth was unfit for a vessel under any circumstances to lie in. There was nothing inherently or intrinsically wrong in the berth, and it appears to me a mere question of the degree and time of the tide whether this piece of cement would have touched the rotten bottom of the vessel. It appears also to me that Lord Halsbury uses the word "invited" as convertible with the term "ordered," that is to say, was ordered to go to a berth that under no circumstances could be fit to lie in, and that in that case the position would be governed by the *earlier* cases as well as the case of *The Moorcock* (1). Certainly there is nothing in the earlier cases to support the plaintiff's contention in the present case. I think Lord Halsbury referred to a berth which, from its inequality and other defects, was known to be unfit. However, in the next sentence the matter is made plain. He says: "In this case the wharfinger, who happens to be the consignee, invites the vessel to a particular place to unload. If, it is said, to his knowledge, the place for unloading was improper and likely to injure the vessel, he certainly ought to have adopted one of these alternatives: either he ought not to have invited the vessel, or he ought to have informed the vessel what the condition of things was when she was invited, so that the injury might have been avoided." That is to say, such duty would arise if it was known that the place was dangerous. All such knowledge not only was not shown to exist in the present case, but its existence was negatived.

Again Lord Halsbury says: "He" (meaning the wharfinger or consignee), "in the first instance, as he had a right to do, gave a direction that the vessel should come and unload at that wharf.

(1) 14 P. D. 64.

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If under no circumstances and at no time the vessel could have gone to that wharf—though in that case, as I think, a serious question would arise as to whether it is not for the captain or the pilot as representing the shipowners to make up his mind whether he can safely get to that place or not, and to make his election whether he will or will not attempt to do so with a view to safety—still, if under no circumstances the vessel could with safety have gone there, and if he had relied upon that statement for the purpose of getting there, a different question would have arisen." This sentence in the judgment certainly cannot be cited in favour of the plaintiff, because it cannot be said that under no circumstances could the plaintiff's lighter with safety have gone into the berth, and it could not be contended that there was any express direction or order to bring her into the particular spot. There was no immediate misleading by an express direction into a place of danger, and it will be seen that the hypothetical instances of responsibility which the Lords in their *dicta* in the case of *The Calliope* (1) were discussing were cases of express orders to bring a vessel to a particular dangerous place. They were dealing with the note sent by the man Griffith, in the hypothetical instances put by them, as an absolute express order, though in the end they came to the conclusion it was not of that character. This, I think, is clear from what Lord Halsbury said. At the end of page 16 he is reported to have said "that he" [Griffith] "gave orders in the sense of a command in relation to the approach of the vessel to the side of the wharf; or that they so understood it, or placed any reliance upon his words as being orders, I certainly do not believe."

The benevolent Waterford jury found that the defendant by his servants invited the men on board the lighter to bring her to this berth. Certainly there was no express invitation or order, and it does not appear to me that a mere contract to carry from Waterford to Campile was tantamount to an invitation, direction, or order in the sense these terms were used by the Lords in their judgments in *The Calliope Case* (1). I have quoted the language of Lord Halsbury as to orders. Lord Herschell, dealing with the

(1) [1891] A. C. 11.

same matter, said (see p. 30 of the report) :—"Therefore I do not think that this letter can be taken as an invitation to come in under all circumstances." The expressions "invited," "directed," "ordered," are used by the Lords in *The Calliope Case* (1) as convertible terms—identical in signification. They import something of a direct and express character as to coming to and using a particular berth. "Directed" is the word used by Lord Watson in the passage of his judgment towards the end of p. 21 of the report. He uses "directed" and "invited" as convertible terms, and was dealing with such an order as it was alleged the man Griffith gave.

But where are we to draw the line? Suppose that the Pill extended for half a mile, with a narrow channel 8 feet wide, in which alone a lighter could sail, and that it was necessary, in order to get to the quay, that the vessel should come up that channel for half a mile, would the defendants be responsible, under a contract to carry from Waterford to Campile, for an injury caused by obstruction existing anywhere throughout the half mile? Take the case of a Dublin merchant with the use of part of a quay on the Liffey. A vessel coming to the quay with a cargo for him is injured by an obstruction in the Liffey. He is not in possession of the river, nor has he any control over it, and knows nothing of the danger. Is he to be responsible? It would be a very wide proposition to say that he was.

Several hypothetical cases were put during the argument—supposed examples of injuries occurring upon land. I am told there is a difference in the responsibility arising from accidents by land and water, but as law is said at least to be a science, I ask where is the *principle* of the difference to be found? Is it by reference to the fact that the elements are different, that land is not water and water is not land, that this question as to *principle* is to be solved? It is easy enough to put together a patchwork of *dicta*, but where is the *principle* of the distinction?

I am of opinion that judgment should be entered for the defendants.

J. G. T.

(1) [1891] A. C. 11.

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The defendants appealed (1).

Cherry, K.C., and *Battersby*, for the appellants.

W. M. Magrath and *D. J. O'Brien* (with them *Carrigan*), for the plaintiff.

The arguments were similar to those addressed to the King's Bench Division.

Feb. 15.

FITZGIBBON, L.J. :—

This case depends upon the application to its particular facts of a general principle of law, and of the decision of the English Court of Appeal in *The Moorcock* (2), as explained by the judgments of the Lords in *The Calliope* (3).

The plaintiff has recovered damages—the amount of which is not now in question—for injuries caused to his barge by grounding upon a bag of cement lying in a berth at the defendants wharf at Campile, in tidal water, only the top of it being visible at low water. The portion of the wharf where the injury occurred was a rough quay or jetty, put up by the defendants for the purpose of discharging barges bringing cement, coal, and other things there for them, and the rest of the wharf was built by John Kenny about ten years ago. No barge could discharge without taking the ground. The berth where the plaintiff's barge was injured was close to the quay, and when the tide fell the barge was left dry.

The defendants held and used the wharf under a written agreement, by which they took, and John Kenny let, for three years, from July 1, 1901, the portion of his wharf at Campile on which their cement shed was situated, with access thereto, and also the use of the wharf for discharging and loading. I assume that this was a demise only of the site of the shed and the portion of the wharf immediately adjoining it ; but it gave to the defendants the use of the whole wharf for discharging and loading, and they seem to have put up the quay as incident to that use. It did not operate as a demise of the foreshore.

(1) In the Court of Appeal, before FITZ GIBBON, WALKER, and HOLMES, L.JJ.
(2) 14 P. D. 64. (3) [1891] A. C. 11.

Two servants of the defendants were employed at the wharf: one of them (Munro) described himself as the defendants general superintendent and manager at Campile; the other (Ivors) was the storekeeper. Munro proved that the berth in which the plaintiff's barge was injured was "a regular berth for discharge, and that about a dozen lighters a week discharged at it for two years before the trial." There is no evidence that anyone used the wharf except the defendants and those engaged in their business.

The plaintiff's bargeman (Meyler) hired the barge, for the occasion on which it was injured, to the defendants' agent. He knew the quay thoroughly well; he had often examined the berth at low water, and he said—

> "We generally have a tide to examine the place when we come to a berth. I was often in that berth, and about ten days, or less, before this injury occurred; it was then a safe, fair berth."

The barge was hired for £4, to deliver 40 tons of cargo, consisting of two girders to be delivered at Belvue, and about 25 tons of coal to be delivered "at Campile." The evidence of Meyler, the plaintiff's bargeman, and of Munro, the defendants manager, and all the facts, conclusively prove that, for the fulfilment of this contract, it was necessary to berth the barge on the ground at the quay, and that the place where she was injured was one of the berths in ordinary use for that purpose. In short, that she finished her voyage when she took the ground there.

Meyler arrived with the barge off the quay on the evening of September 5, 1902, but could not "fit in," because another boat was delivering at his berth, and he had to run across to the opposite side of the river. Early the following morning, about 7 a.m., he moved across the river at high water, and moored at the quay; but had to wait for about an hour and a half, while the gang of the defendants men who were discharging his boat went to discharge another. In all this Meyler was acting within call of the defendants general superintendent and manager, and in accordance with the terms on which the barge was hired. About 8.30 a.m., as he was eating his breakfast in the cabin, he heard a noise and rush of water into his boat. He applied to Munro, and told

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him his boat was "burst up," that he was on the quay, but when the tide fell he found that "she sat on a block of cement," and it came through the bottom, which was flat.

The other boat that had just left the berth had a round bottom, and was shorter and narrower than the plaintiff's boat. From whatever cause, the other boat was not injured, but the bottom of the plaintiff's boat was "burst up" by the bag of cement.

The jury found that the injury was occasioned by grounding on the block of cement; that the barge berthed where it did by direction of the defendants servants; that the berth was not reasonably fit and safe for that purpose; that the defendants, by their servants, did not take reasonable care to ascertain that the berth was reasonably fit and safe for the barge; and that they could, with reasonable care and skill, have removed the cement and made the berth safe.

Contributory negligence was negatived by the jury.

The only question now really in dispute is whether there is any legal foundation in the facts for the implication of a duty on the part of the defendants to take reasonable care to ascertain that the berth was reasonably safe. That they did not use reasonable care; that the berth was not safe; that the defendants could easily have made it safe; and that the injury was done by the block of cement, are facts either admitted or found by the jury on sufficient evidence.

Munro deposed:—

> "When Meyler called him he went aboard the barge, and saw something underneath which had started the plank. He had observed other lighters mooring there, and the crew waiting in the boat till she grounded; they moored immediately alongside the quay. This part was built by the M'Alpines for that purpose. Quantities of cement were discharged there; bags of cement were piled against the store and on the quay, leaving about 6 or 7 feet between them and the edge. Anything might have rolled off the quay into the river. The storekeeper looked after the quay, and it was partly his business to see that nothing fell off the quay into the berth. It was no part of his (Munro's) duty to see the berth was kept clear; it was part of the storekeeper's duty to do so. His (Munro's) duty was general superintendence."

The storekeeper, Ivors, describes his duty in these words:—

> "I have to get the men to unload the barges, and I take the cargo in charge, and store it inside the store, if room, and if not room inside, I stack it outside. If coal or a bag of cement falls overboard, I have to go down and take it out. I never remove anything out of the berth except what falls overboard or off the quay, and that is if it is of use to M'Alpine. I had not seen this block of cement before the accident. I saw it some days after the barge left the berth; about a half-inch of it was visible at low water. I took it out of the berth; it was just a piece of cement that had broken off a bag of cement, about 1 foot square; it had got damaged before it fell off the quay. I am nearly sure of that, because it could not harden in the water. From my experience there, I would say it fell off the quay."

Upon this evidence I find it impossible to doubt the liability of the defendants, or to see any respect in which that evidence is not stronger against them than was the evidence against the defendants in *The Moorcock* (1). In both cases the injury was caused by an obstruction below low-water mark, in a place where the defendants had no property, and over which, in *The Moorcock* (1), they had no control. In *The Moorcock* (1) their liability was established on the general principle that they had invited the plaintiff's ship into a dangerous berth for good consideration; they had the means of seeing whether it was safe; the law implied against them the obligation to do so; they had not done so; and therefore they were held liable for not using reasonable care to ascertain whether there was danger, and, if there was, removing it, or warning the plaintiff against it.

The decision in *The Moorcock* (1) was discussed and recognised, but distinguished, by the House of Lords in *The Calliope* (2). In the judgments there are specific references to the grounds of the decision in *The Moorcock* (1), and to the facts upon which the defendants in *The Calliope* (2) were held not liable, which apply directly to the facts of this case, and I cannot relieve the defendants here, consistently either with the decision in *The Moorcock* (1), or with definite statements of the law in *The Calliope* (2) which I cannot get over by describing them as "some *dicta* in the speeches of the Lords."

(1) 14 P. D. 64. (2) 14 P. D. 138; [1891] A. C. 11.

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The defendants have contended that the *ratio decidendi* in *The Moorcock* (1) was that the defendant was a wharfinger, in the sense of a person who hires a wharf to a shipowner. With all respect, it is only necessary to read the case to see, as the Lords expressly said in *The Calliope* (2), that the liability rested upon the fact that for good consideration the defendants had *invited* the plaintiff to moor his ship in the place where it was injured, under circumstances which, in the ordinary course of business and in reason, raised the implication that the defendants had at least undertaken to use reasonable care to *see* that the berth was safe; the wider undertaking to *make* it safe, or to *keep* it safe, was there, more than here, qualified by the evidence as to the control of the place in question. But the distinction is immaterial, because even if the lesser duty only—to see that the berth was safe—existed, the defendants here are liable for its breach.

The facts in *The Moorcock* (1) appear at 13 P. D. 157. The plaintiff and defendants had agreed that the plaintiff's ship should be discharged and loaded at the defendants wharf, and for that purpose should be moored alongside the defendants jetty, and so take the ground at low tide. This is precisely the contract here. It is described by Butt, J., as—

> "intended for the mutual benefit of the two parties to it, and therefore, whatever the promise or engagements on one side or the other were, there was good consideration for them."

It can make no possible difference, for our purpose, whether a wharfinger hires his wharf to a shipowner to have a vessel discharged there—or the occupier of a wharf hires a barge to discharge a cargo at his wharf. Butt, J., held that—

> "It being clear that the use of the berth by the ship could not be had without her mooring alongside the jetty, and taking the ground at it, the defendants must be taken by implication to have represented, at least this much, that they had taken reasonable care to ascertain that the bottom of the river at the jetty was in such a condition as not to endanger the vessel using their premises in the ordinary way."

Lord Esher treated the agreement for the use of the wharf in

(1) 14 P. D. 64. (2) 14 P. D. 138; [1891] A. C. 11.

The Moorcock (1) as made "to enable the wharfinger to earn money from the plaintiff"; here it was made to enable the defendants to take delivery of coals from the plaintiff. The use of the wharf, in both cases, involved the use of the river, and the mooring of the vessel at the jetty, and her taking the ground there, below low-water mark, at every tide. In Lord Esher's opinion, honest business could not be carried on under such circumstances, unless the defendant had impliedly undertaken some duty towards the plaintiff with regard to the bottom of the river at the place of mooring, and he says (p. 67):—

> "It is implied that they have undertaken to see that the bottom of the river is reasonably fit, or, at all events, that they have taken reasonable care to find out that the bottom of the river is reasonably fit, for the purpose for which they agree that their jetty shall be used; that is, they should take reasonable care to find out in what condition the bottom is, and then either have it made reasonably fit for the purpose, or inform the persons with whom they have contracted that it is not so."

In *The Moorcock* (1) the defendants were held liable for injuries caused by a hardened ridge left on the natural bottom of the Thames by the weight of a previous occupant of the berth, which did not strip at low water; here the mischief was done by a bag of the defendants cement, which either fell off their wharf, where it was in charge of their servant, or dropped overboard from a barge while unloading at their quay under the superintendence of the same servant. In addition, their general manager stated that it was the storekeeper's duty to see that the berth was clear, and he had on other occasions known bags of cement to fall into the berth, and had taken them out for the defendants.

Lord Esher said that *The Moorcock* (1) decision went a step beyond any of the cases cited, which were not all wharfingers' cases. This case falls far short of *The Moorcock* (1) upon the facts.

Bowen, L.J., based the implied contract on the presumed intention of the parties and on reason; he held that both parties

(1) 14 P. D. 64.

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must have known that unless the ground was safe the ship would be simply "buying an opportunity of danger" in grounding at the jetty, and although the defendants had no duty, by statute or at Common Law, to repair the bed of the river, and had "no power to interfere with it unless under the license of the conservators," he said:—

> "The law will not imply that the persons who have not control of the place have taken reasonable care to make it good, but it does not follow that they are relieved from all responsibility; they are on the spot; they must know that the jetty cannot be used unless reasonable care is taken, if not to make it safe, at all events to see whether it is safe. No one can tell whether reasonable safety has been secured except themselves, and if they let out their jetty for use, they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe; and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so."

He met the argument, which Mr. Cherry used, that holding the defendants liable would involve holding them liable for injury caused by an obstruction anywhere else on the voyage, by saying that he did not at all consider this a case of any duty to see to the access to the jetty being kept clear, and he instanced the difference between *access* and the *actual use* as just that "difference of degree which brings one case on the line and prevents the other from approaching it." The obstacle here was in the berth itself; in *The Moorcock* (1) it was a ridge which fringed it. In both cases lying in the berth was "the essential part of the use of the jetty," which the defendants had constructed for the purpose. But it is said that the bargeman ought to have seen for himself that the berth was safe. In the first place, this omission would be only contributory negligence, if there was *any* duty on the defendants; and the jury have negatived contributory negligence. But on the facts, what could he have done? He had used the berth before, he had even examined it, and found it a safe fair berth, and clear, about ten days before. When he arrived on the previous evening the tide was in, and the berth was occupied by the other barge.

(1) 14 P. D. 64.

Was Meyler, after taking his own barge across the river, to return at midnight, when the tide was out, to grope under the round-bottomed barge for a bag of cement that he had no reason to believe to be there? In the morning, at seven c'clock, at high tide, might he not take the fact that the previous occupant was floating safely out to make room for him, as at least *prima facie* evidence that no bag of cement had got into the bottom of his accustomed berth since he was last there?

The Calliope (1) was decided in favour of the defendants, because the Lords took a view of the facts different from that taken by the Court of Appeal. But they described the state of facts in which the defendants would have been liable in words precisely applicable to this case; and they rested the liability upon a principle not peculiar to navigation, or to wharfingers, but directly applicable to the defendants here.

Lord Halsbury said:—

> "If the vessel had been invited to a berth at which it was unfit for a vessel under any circumstances to lie" (words appropriate to a berth occupied by a bag of hardened cement), "and that by reason of the inequality and unfitness of the berth, the vessel being brought there was injured, he certainly entertained no doubt that the law, as laid down in the case of *The Moorcock*, would have been applicable to that state of things."

He extends the limit of the duty, where it exists, to a reasonable distance from the wharf; and refers particularly, as distinguishing the case of *The Moorcock* (2), to the fact that there was no evidence in the case of *The Calliope* (1) that the alleged obstruction was not "the normal condition of the bank."

Lord Watson says:—

> "Had it been shown that the berth which the defendants directed the 'Calliope' to occupy was unfit for that purpose, being in an uneven, dangerous, and defective condition, and that the injuries sustained by the 'Calliope' were due to that cause, the present case would have been within the principle followed both by the Admiralty Judge and the Court of Appeal in the 'Moorcock.'"

(1) 14 P. D. 138; [1891] A. C. 11. (2) 14 P. D. 64.

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The following passage in his judgment (p. 23) rules this case :—

> "I do not doubt that there is a duty incumbent upon wharfingers in the position of the appellants towards vessels which they invite to use their berthage for the purpose of loading from or unloading upon their wharf. They are in a position to see, and are, in my opinion, bound to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying in the wharf. If the approach to the berth is impeded by an unusual obstruction, they must either remove it, or, if that cannot be done, they must give due notice of it to ships coming there to use their quay."

Lord Herschell says (p. 27):—

> "I do not for a moment deny that there is a duty on the part of the owner of the wharf to those whom he invites to come alongside that wharf, and a duty in which the condition of the bed of the river adjoining that wharf may be involved. But in the present case we are not dealing, as were the learned Judges in the cases cited, with a condition of the bed of the river in itself dangerous—that is to say, which is such as necessarily to involve danger to a vessel coming to use the wharf in the ordinary way ; and we are not dealing with a case of what I may call an abnormal obstruction in the river—the existence of some foreign substance or some condition not arising from the ordinary course of navigation. . . . If the obstruction which created the difficulty in the approach of this vessel to the wharf at this particular tide had been one caused by some unusual and extraordinary circumstance which those navigating the river would have no right to anticipate, but which would be known to the wharfinger, then I quite agree that some duty on his part would arise towards them ; and, in the absence of warning, it may be that he would be under some responsibility. . . . This is not a case of anything foreign or strange in the condition of the bed of the river."

Seeing that the facts here are stronger against the defendants than were the facts in *The Moorcock* (1), and applying the decision in *The Moorcock* (1) and the statements of law by the Lords in *The Calliope* (2) to these facts, I am clearly of opinion that the appeal must be dismissed with costs.

(1) 14 P. D. 64. (2) [1891] A. C. 11.

WALKER, L.J. :—

I think it material to consider the nature of the quay at which the injury to the plaintiff's vessel occurred, and the relation of the defendants towards it, and the contract entered into by the plaintiff with the defendants.

The M'Alpines are railway contractors, and to carry out their contract it was necessary for them to purchase cement and rails, and girders, and coal, amongst other matters.

Campile, on the river, was a convenient place for landing the cargo they required. Some ten years before the date of the trial a shopkeeper at Campile named Kenny had constructed this quay at Campile, partly on the foreshore. It had been originally, as built by Kenny, a sloping bank of earth, and there was a store on it. He made a letting to the defendants of the site of a cement shed on the quay for three years, and also the use of the wharf for discharging and loading. The defendants after the letting built up the point of the quay with rough stones. It sloped towards the river, and they placed iron fenders in front. It is sworn that no one used the quay but the M'Alpines. The quay wall was 120 feet long; lighters discharged there, and quantities of cement were delivered at it.

It was part of the business of defendants' storekeeper to see that nothing fell off the sloping quay into the berth, and that the berth was kept clear. From the character of the tidal water beside the berth it was an incident to discharge there that a barge should take the ground at low water. The defendants made a contract for value with the plaintiff to bring from Waterford by his barge, and deliver, a cargo of girders, which were to be delivered at Bellevue, and the residue of the cargo (mainly or entirely coal) at Campile. It was a necessary incident to the contract known to both that the vessel should lie beside the quay, and at low water take the ground.

The plaintiff had been in the same berth often before at all states of the tide, and found it safe, and ten days before the injury, the subject of the action, he had been in the same berth, and it was then safe.

For the purpose of carrying out his contract the plaintiff's

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bargeman came to Campile down the river, and approached the quay. He found it occupied by another vessel, and he crossed over to the other side, and next morning came over on the top of the tide to carry out his contract to deliver his cargo. He lay up beside the quay, and when the tide fell the barge rested on a block of cement, which had evidently fallen off the quay into the river. It was an abnormal thing there, and could not have been anticipated by the plaintiff; and it was found by the jury, and there is no doubt of the fact, that this abnormal thing in the bed of the river caused the injury. It was not the state of the bottom caused by the normal use of the berth by other vessels.

Thus these defendants, who had got the lease of the store, and control over the quay for the purpose of discharging and loading—a quay which it was the duty of their storekeeper to keep clear—had contracted with the plaintiff to give him delivery at the quay and alongside it, where the vessel must take the ground at low water. The contract could not be carried out without this occurring. Under these circumstances was there an implied duty on the defendants to take reasonable care that the berth was reasonably safe for a vessel using it in the way the contract contemplated? The block of cement was to a small extent visible at low water, and it was easily removable, but while there was dangerous.

In my opinion this case is at least as strong in favour of the plaintiff as *The Moorcock* (1). In both the injury occurred at a spot not under the control of the defendants—the bed of the river. There is no express warranty and no *scienter*, but the contract in *The Moorcock* (1) involved a representation that the defendant had taken reasonable care to ascertain that the bottom at the jetty where the delivery was to be made was in such a condition as not to endanger the vessel using the quay. What caused the injury in the case of *The Moorcock* (1) was a ridge or saddle of hard ground beneath the mud. The duty found was to take reasonable care to have the bottom safe, or warn the person coming there under the contract that it was not. Bowen, L.J., draws a distinc-

(1) 14 P. D. 64.

tion between a duty to keep the access to the jetty safe, which he says did not exist, and a duty to keep the use of it safe, which he says reasonably did from the nature of the transaction between the parties.

The Moorcock (1) was said by the Judges in the Court of Appeal to go beyond previous cases, but it has never been dissented from; and I think if the facts in *The Calliope* (2) had been the same, the decision would have been for the plaintiff. There there was a charter-party, and the defendants, who were also proprietors of a wharf, were indorsees of the bill of lading. There were two berths, one outside, and a ridge of mud was formed between the berths by vessels using them. The decision was that the injury was caused by the captain and pilot attempting to berth the vessel alongside the wharf at a time of the tide when it was not safe for a vessel of her draught and trim, but the Law Lords carefully distinguish the nature of the liability in a case like *The Moorcock* (1). Fitz Gibbon, L.J., has already referred to the important passages in the speeches of the Law Lords.

The findings of the jury, 1, 2, 3, and 4, meet all the material points in the case. If there was evidence to go to the jury in support of these findings we cannot interfere with the verdict, and I think there was. Mr. Cherry contended that the contract did not anticipate the use of the quay, and that the use of it was only a loan for convenience, like the use of the crane in *Blakemore* v. *Bristol and Exeter Railway* (3). I think the relation between the parties under the contract involved as part of it the use of the quay for delivery of the cargo.

I am not prepared to say that analogous circumstances arising in respect of a carriage by land will not involve an analogous reasonable presumption of duty. Here, at all events, we are dealing with a contractual carriage and delivery by water, which I cannot distinguish in principle from what occurred in the case of *The Moorcock* (1), and the principle recognised in *The Calliope* (2).

(1) 14 P. D. 64. (2) [1891] A. C. 11. (3) 8 Ell. & B. 1035.

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HOLMES, L.J. :—

This is a small case, and it is to be regretted that it was not brought in the Civil Bill Court. Whether it were decided by the County Court Judge, or by the Judge of Assize on appeal, it is probable that the plaintiff would have been successful; and even if the damages had been smaller, a larger portion of them would have reached his pocket. My difficulty is not that the action was determined in his favour, but that it was tried and has been argued upon the assumption that there was imposed on the defendants a more extended duty than ought to be inferred from their contract and the surrounding circumstances.

The defendants are tenants of a store or shed erected on a quay alongside a tidal river. The quay is a rough structure, having its sea-wall of coarse rubble, not coped, and not quite perpendicular, and with a considerable slope from the shed towards the water. It would seem that goods, or other articles, placed on it were liable to roll, or to be pushed, into the river, and if such an accident happened, it was the duty of the defendants' storekeeper to recover whatever had thus fallen from the landing-stage. There was, I think, evidence from which the jury might have reasonably inferred that the cement which damaged the barge was the property of the defendants, that through want of care on the part of their servants it had been allowed to drop from the sloping surface of the jetty into the water, and that the injury complained of was thus the direct consequence of negligence, for which the defendants are responsible. If a question founded on this view of the case had been left to the jury, and answered in the affirmative, I believe that the verdict could not have been objected to. But the issues dealt with at the trial were wholly different. They were framed on the assumption that the defendants were bound to take reasonable care to ascertain that the berth was fit and safe for the barge—in other words, that it was their duty to search in the water alongside the quay for anything calculated to injure the boat, and to remove it, whether they were responsible for its presence there or not. The proposition argued on behalf of the plaintiff was that although the cement had been placed in the river by some third party without the knowledge of

the defendants, he would be entitled to succeed, and this was also the view of the majority of the Divisional Court. I agree with the Lord Chief Justice in holding that this goes beyond the duty and obligation imposed on the defendants by their contract with the plaintiff. The agreement was that the plaintiff would carry in his barge, "The Royal Oak," some tons of coal from Waterford to Campile, and there deliver them at the defendants' wharf.

The master of the barge knew the place well, and had visited it frequently during the two preceding years. He had often examined the berth at low water; the vessel was brought to and from the jetty by poles, and poles were also employed to keep her safe as the tide fell. But while the bargemen both possessed, and were in the habit of using, the means of ascertaining the character of the bed of the river beside the quay, there is no evidence that it was ever examined by the servants of the defendants. They had neither property in it nor control over it, and I cannot conceive it to have been in contemplation of either party, when the contract was entered into, that they were to have any duty in regard to it.

Strong reliance is placed by the plaintiff's counsel on *The Moorcock* (1), and it is thought by my colleagues that their judgment is a necessary consequence of that decision. I am so unfortunate as to be unable to see any analogy between the two cases. In *The Moorcock* (1), the owner of a steam-vessel trading between Antwerp and London agreed with wharfingers, having a wharf abutting on, and a jetty extending into, the river Thames, at Wapping, that the cargo of their vessel should be discharged and loaded thereat, they paying for the use of cranes and rates on all goods landed at, or shipped from, or stored on, the wharf. When the contract was entered into, there was some reference to the suitability and safety of the place, but what was actually said was left in doubt. The "Moorcock" could only come along the jetty as steam-ships do when entering a strange berth, of which its officers can know nothing. There neither was, nor could be, an opportunity of examining it by poles or sounding. The captain was obliged to trust the wharfinger that his ship would not

(1) 14 P. D. 64.

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be exposed to danger in running alongside the jetty, and the wharfinger must, or at least ought to, have been aware that he was so trusted. Lord Esher said that the decision in *The Moorcock* (1) went a step beyond any of the previous authorities, but I am of opinion that it was justified by the character of the contract. The contract in this case seems to me to be quite different in its incidents; and I think that the proposition relied on by the plaintiff's counsel not only goes many steps beyond *The Moorcock* (1), but is not a reasonable conclusion from the admitted facts.

Solicitor for the plaintiff: *P. A. Murphy.*
Solicitors for the defendants: *Dobbyn & M'Coy.*

R. D. M.

K. B. Div. 1903. Oct. 6.

KATHLEEN BARRY & OTHERS *v.* FRANCIS SPAIGHT & SONS, LIMITED (2).

(1902. No. 2443.)

Practice—Costs—Taxation between party and party—Fees to counsel—Instructions for brief—Service of subpœnas—Attendance of solicitor on the record as witness—Rules of Supreme Court, Ireland, 1893, *Ord. LXV., R.* 64.

In an action brought under Lord Campbell's Act, claiming damages in respect of the death of the plaintiff's husband, caused, as was alleged, by the negligence of the defendants, judgment was entered for the plaintiff for £2500 and costs. The plaintiff's solicitor paid to senior counsel fees on briefs on the trial of 20 guineas each, and to junior counsel a fee of 15 guineas, and refresher fees of 10 guineas and 7 guineas respectively. On the taxation of the plaintiff's costs as between party and party, the Taxing Master reduced the fees on counsels' briefs to 12 guineas and 8 guineas, and the refresher fees to 5 and 3 guineas respectively. He also reduced the charge of £100 claimed by the plaintiff's solicitor, for instructions for brief, to £20, and disallowed *in toto* a claim for allowances in respect of the said solicitor's attendance as a witness at the trial:—

Held, on a motion for review of the taxation of the plaintiff's costs in the

(1) 14 P. D. 64.
(2) Before KENNY, BARTON, and WRIGHT, JJ.

action, that the Taxing Master had failed to recognise the magnitude and difficulty of the case, and that the amounts paid to counsel on briefs on the trial should be restored; that the amount allowed to the plaintiff's solicitor for instructions for brief was inadequate, and that this item should be sent back to the Taxing Master for reconsideration.

The Court refused to interfere with the exercise of the Taxing Master's discretion in respect of the refresher fees, and affirmed the disallowance of the claim in respect of the attendance of the plaintiff's solicitor as a witness.

APPLICATION by the plaintiffs for a review of the taxation of their costs in this action, which was one under Lord Campbell's Act, claiming damages in respect of the death of the plaintiff Kathleen Barry's husband, a medical doctor formerly practising at Limerick, who died from injuries received in a collision that occurred between a car on which he was driving, and a dray laden with timber, the property of the defendants. The trial took place before the Lord Chief Justice and a special jury of the city of Dublin, during the Trinity Sittings, 1902, and resulted, after a hearing which lasted three days, in a verdict and judgment for £3000 being entered for the plaintiffs, this judgment being subsequently reduced by consent to one for £2500. The nature of the action is more fully mentioned in the judgment.

On the taxation of the plaintiffs' bill of costs, as between party and party, the Taxing Master reduced the fees of twenty guineas paid to each of the plaintiffs' senior counsel on briefs on the hearing, and a fee of fifteen guineas to junior counsel, to twelve guineas and eight guineas respectively. He reduced the refresher fees of ten guineas to senior counsel, and seven guineas to junior counsel, to five and three guineas respectively. He reduced a charge of £100 claimed by the plaintiffs' solicitor for "Instructions for Brief," to £20. Charges for serving subpœnas upon witnesses were reduced from 5*s.* to 2*s.* 6*d.* each. The plaintiffs' solicitor claimed, in addition to the remuneration payable to him as solicitor on the record for attending the trial, allowances and travelling expenses as a witness, amounting to £22 1*s.*, calculated at £3 3*s.* per diem for seven days. The Master disallowed this claim *in toto*, and also reduced an allowance of £1 per diem made to Mr. Kearney, a Railway Traffic Superintendent, for his attendance as a witness, to 17*s.* 6*d.* per diem.

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The Solicitor-General (*Campbell, K.C.*), *O'Shaughnessy, K.C.*, and *P. Lynch*, for the plaintiff :—

The Taxing Master has failed to recognise the fact that this was a case of importance and gravity, requiring the utmost vigilance and attention on the part of counsel and solicitor to bring it to a successful conclusion. The fees and refreshers were paid to counsel by the solicitor acting *bona fide* in the interests of his client, and ought not to have been reduced. The Taxing Master's statement that such fees are immoderate is an extravagant one: *Maconchy* v. *Bank of New Zealand* (1); *Robb* v. *Connor* (2); *In re Galway Election Petition* (3); *Dyott* v. *Reade* (4).

The sum of £100 claimed by the plaintiffs' solicitor was a moderate one, having regard to the nature of the case, and the difficulties thrown in his way by the defendants. Vouchers were produced for every item of expenditure, and for every hour of work done in connection with the case. These were never challenged, and this sum should not have been reduced.

A number of necessary witnesses resided in Limerick, and it was necessary to serve these with subpœnas. A subpœna is a writ, and in the schedule of costs (App. S., Part 1, No. 26, to the Rules of the Supreme Court (Ireland), 1893) 5*s.* is the minimum fee allowed for the service of writs, citations, summonses, etc.

As to the witnesses' expenses, Mr. Kearney, who occupied the position of Traffic Superintendent in the employment of the Great Southern and Western Railway, was entitled to £1 per diem under Order LXV., R. 64 (11) D. He was paid this amount, and the plaintiffs' solicitor should not be allowed to be out of pocket in respect of charges actually paid by him. There is no category allowing 17*s.* 6*d.* per diem. Mr. Gaffney's attendance as a witness was necessary, and was directed by senior counsel at consultation. If he had not been so examined, it would have been necessary to call an accountant to depose as to the contents of Dr. Barry's books, and the fact of his being a solicitor on the record for the plaintiffs should not disentitle him to his proper remuneration as a witness :

(1) [1900] 1 I. R. 22.
(2) I. R. 9 Eq. 373.
(3) I. R. 7 C. L. 445.
(4) 10 I. L. T. R. 110.

Heffernan v. *Vaughan* (1); *Colhoun* v. *M'Namee* (2); *Craig* v. *Boyd* (3).

D. B. Sullivan, K.C., and *Phelps*, for the defendants:—

The Taxing Master in making these deductions exercised a discretion which should not be interfered with. The action was an ordinary one of negligence, with no complication of law or fact, and bears no analogy to cases of magnitude such as *Maconchy* v. *Bank of New Zealand* (4), and *Dyott* v. *Reade* (5). The mere fact that, owing to Dr. Barry's position as a medical practitioner, large damages were obtained does not increase the importance or difficulty of the case.

As to the charges for service of subpœnas, we contend that a subpœna is not a writ; 2*s.* 6*d.* is the ordinary charge for the service of subpœnas, and the Taxing Master followed the established practice in only allowing this amount. Mr. Gaffney was paid the ordinary remuneration for his attendance in Dublin as solicitor for the plaintiff, and is not entitled to extra remuneration as a witness. His attendance was not directed by senior counsel in the direction of proofs.

Cur. adv. vult.

KENNY, J.:—

This is an application by the plaintiffs for a review of the taxation of their costs of this action. The Taxing Master, whose rulings we have to consider, is a most experienced and competent officer, and, to judge from his report, he has given to the subject of the plaintiffs' objections the very greatest consideration. These objections deal with five different classes of items, viz.:—(1) counsels' fees on briefs at trial; (2) counsels' refreshers at trial; (3) solicitor's fee on instructions for brief at trial; (4) allowances for service of subpœnas; (5) disallowances to two witnesses at the trial.

As the discussion before us—and, I presume, before the Master also—turned largely on the gravity and complexity of the case

(1) 18 I. L. T. R. 38.
(2) 1 New Ir. Jur. 275.
(3) [1901] 2 I. R. 645.
(4) [1900] 1 I. R. 22.
(5) 10 I. L. T. R. 110.

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and on the alleged action of the defendants in creating, or at least increasing, the plaintiffs' difficulties in successfully prosecuting their claim, it becomes necessary to shortly state the circumstances that gave rise to the cause of action, and, as is alleged, subsequently impeded the prosecution of the latter.

The action was tried in Dublin. It was brought under Lord Campbell's Act by the widow and children of the late Dr. Barry, of Limerick, for recovery of damages in respect of Dr. Barry's death, resulting from fatal injuries received in a collision between a car of the defendants and one on which Dr. Barry was driving. The occurrence took place on the 28th November, 1901, and Dr. Barry succumbed to the injuries he received in the following month of February, 1902, whereupon the action was at once instituted. The venue was laid in Dublin, and not in Limerick, where all the parties resided, and where the cause of action arose, on the ground—which the Court afterwards on a venue motion held to be a reasonable one—that the defendants were an influential Limited Liability Company, carrying on their business in Limerick, and with a body of shareholders resident in that city and county. The trial lasted for three days, and resulted in a verdict for £3000, which by consent was subsequently reduced to £2500. The substantial, if not the only, issues between the parties were as to the identity of the car which collided with that of Dr. Barry, and as to negligence. As to the difficulties thrown in the way of the plaintiffs in establishing their claim and prosecuting their suit, it has been alleged at the Bar, and not contradicted, that not only were no facilities afforded by the defendant company for the identification of their driver and car, but every possible step was taken to, what I may call, cover up their tracks and prevent discovery. It was alleged—but this was denied—that attempts were made to tamper with the principal witness to the occurrence—that when the carman's identity was sought to be established through the medium of delivery notes in the possession of a railway company, the latter was required by the defendants to give no information—and that finally it was sought to do away with a block of a receipt or note relating to the delivery by this cart. Finally, we are told by the Solicitor-General that an additional question was raised by the defendants as to the injuries received being the cause of death.

This is the plaintiffs' case, as stated by their counsel, and it is obvious from it that though on the issue of negligence the case may not have presented difficulties more insuperable than those which arise in ordinary actions for personal injuries caused by negligence, a somewhat unusual, and certainly a heavier, burden of proof was thrown on the plaintiffs by the defendants' action, and it seems clear to me, from a perusal of the items charged for in the bill of costs and of those appearing in the special particulars, to which I shall subsequently refer, which were prepared at the instance of the Taxing Master, that a very great and additional amount of labour was imposed on the plaintiffs' advisers in the course of their investigations by the conduct of the defendant company.

The trial took place in June, 1902—it lasted a very considerable time—the plaintiffs were able to surmount the obstacles that lay in their path—and a most substantial verdict was returned. We have been told that the case was one that at the trial required the constant attention and alertness of counsel. That it called for exceptional care is, of course, not admitted by defendants, but I think I may say, looking at the circumstances I have mentioned and the course and result of the trial, that the case was one of extreme gravity—of more than ordinary magnitude, and that its conduct required the exercise of very great discretion and judgment.

With these few preliminary observations as to the circumstances under which the action went to trial, I shall now deal with the items in controversy.

In considering the general principles applicable to taxation as between party and party we are not without guidance. The present Master of the Rolls, in *Maconchy* v. *The Bank of New Zealand* (1), refers, at p. 31, to the tendency of modern decisions to approximate the costs as between party and party to those as between solicitor and client,—and this Court, constituted as it is now, subsequently, in *Nolan* v. *The Great Northern Railway Company* (2), recognised and adopted the Master of the Rolls' language. In a previous case of *Thompson* v. *Moore* (3) the Master of the Rolls had also laid down that "a successful party should, so far as is reasonable, be indemnified from the expense he

(1) [1900] 1 I. R. 22. (2) [1902] 2 I. R. 431, 447, (3) 25 L. R. Ir. 98.

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is put to in an action." These are general observations applicable to all the items now under consideration. When we come to deal with the concrete case of counsels' fees, we find many authorities to assist us in arriving at a proper rule upon the subject. In *Robb* v. *Connor* (1) the late Master of the Rolls, Sir E. Sullivan, while repudiating the notion that he deprecated the vigilance of the Taxing Officer in watching over the items in the bill of costs or in examining each case that came before him, "even in the case of counsel's fees, if they strike him as too large or extravagant," went on to say that the standard by which the fee to counsel should be estimated was the magnitude of the case and the nature of the questions involved in it, and that the principle he was prepared to enforce was this, "that if a solicitor, acting *bona fide* within the rule I have above stated, delivers a brief, with the fee marked thereon, to counsel, *prima facie* that fee ought to be allowed, even in party and party costs—otherwise the solicitor must be exposed in every case to the risk of having to pay out of his own pocket money which he honestly and *bona fide* paid to his counsel, unless he has taken the precaution of fixing the fee beforehand with his client," and he went on to add at the close of his judgment that the Taxing Officer's decision "must be founded on a thorough examination of the nature of the particular case, and upon a discriminating judgment founded thereupon." This case of *Robb* v. *Connor* (1) is invariably cited as a governing authority on what is called "clipping" fees. The Taxing Officer had taken £2 2*s*. off each of two fees of £14 14*s*. and £10 10*s*. to the senior counsel, and a like sum off the fee of £9 9*s*. to the junior—and the order of the Master of the Rolls restored the original fees. In contrast as to result with *Robb* v. *Connor* (1) was the subsequent case of *Dyott* v. *Reade* (2) before the same Judge. That was unquestionably a suit of the utmost gravity. The trial lasted for nine days, and senior counsels' fees on their briefs were 50 guineas each. The Taxing Officer reduced them to 25 guineas. The junior's fee was only 10 guineas, and Sir Edward Sullivan, in giving judgment, affirming the reduction, based his acquiescence altogether upon the amount marked on the junior's

(1) I. R. 9 Eq. 373. (2) 10 I. L. T. R. 110.

brief. He says, that had he been asked the abstract question he would have said that 50 guineas was not too large a fee—but that it was impossible to suppose that the scale of fees given to senior counsel was formed in the solicitor's mind by a mere estimate of the difficulties of the case, but that these fees were given to secure the services of two particular gentlemen. In approving of the reduction of the refresher fees from £10 10*s.* to £5 5*s.*, the Master of the Rolls is reported to have said that, as between party and party, a refresher fee of £10 10*s.* is an unusual amount in this country.

In *Jessop* v. *Cusack* (1) the present Master of the Rolls, Sir A. Porter, in discussing and approving of the reduction by the Taxing Officer of the solicitor's fee for instructions for brief on trial, from £15 15*s.* to £8 8*s.*, says: "I have no scale to measure the sufficiency. . . . The Taxing Officer is a responsible officer selected for his fitness to decide these matters, and I should feel almost bound to accept any figures that he arrived at, short of their being extravagant or manifestly excessive." Again, in *Gregg* v. *Gardner* (2), Holmes, J., in the course of the argument as to the disallowance by the Taxing Officer of £3 3*s.* off £10 10*s.* on each of the two senior briefs at the trial, and £2 2*s.* off £7 7*s.*, the junior's fee, says: "The only general principle that can be suggested is this—that the amount must be at once reasonable, and be paid in good faith, and that where the disallowance is not considerable it is not to be made at all." In this case the original fees were restored. The only other authority I desire to refer to in this matter is that of *Reynolds* v. *Enfield Cycle Company* (3), the report of which is not satisfactory. It is clear from the judgments that counsels' fees on briefs and refreshers were both under consideration, though from the report of the Chief Baron's observations it would seem as if there were no question of fees on briefs. The Taxing Officer had apparently deducted £3 3*s.* from £10 10*s.* marked on the briefs, and £2 2*s.* from £5 5*s.* refresher fee. In affirming the latter reduction the Chief Baron is reported to have said:—"I think it is absolutely impossible for us, when a Taxing Officer tells us that he has *bona fide* exercised his discretion, to send the case back to

(1) 25 L. R. Ir. 244, at 250. (2) [1897] 2 I. R. 122. (3) 3 New Ir. Jur. 205.

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him, as if he had not done so, but . . . I see ample grounds for the decision at which he has arrived," and accordingly the Taxing Officer's ruling as to the refresher fees was not disturbed; but the case having gone to the Court of Appeal, the fees on the briefs apparently came under review, for I find Holmes, L.J., reported as follows:—"In the second place, I wish to say a word as to the reduction of the fee on the briefs from £10 10*s.* to £7 7*s.* I have said on a former occasion, and I now repeat, that in substantial actions, and in the absence of explanatory circumstances, this mode of taxation cannot be justified. It is an exercise of caprice, not of discretion. There is no standard which would enable anyone marking a fee in anticipation of a trial to judge whether £10 10*s.*, £7 7*s.*, or an intermediate sum is the most reasonable. It must be left in a large measure to the judgment of the solicitor, and if he acts in good faith and with ordinary intelligence, his measure of remuneration ought not to be interfered with."

The rule to be deduced from all these cases seems to me to be this. The "clipping" of fees is not to be tolerated. It savours of caprice, and of arbitrary disallowance, unsupported by reason: with such cases there can be no difficulty. But when a substantial reduction is made by the officer who has been specially appointed to the duty of taxation, his decision must receive careful and weighty consideration, and is only to be interfered with if the Court comes to the conclusion that he has failed to adequately recognise the gravity, complexity, and difficulties—in other words, the magnitude—of the case.

I apply these principles to the present taxation.

As to counsels' fees on their briefs at the trial, I cannot but think that the Master has under-estimated the magnitude of the case. The plaintiffs' solicitor marked 20 guineas on each of his senior's briefs, and 15 guineas on that of his junior. The Taxing Officer has reduced the former to 12 guineas, and the latter to 8 guineas. The following is the paragraph (4) of his report dealing with these items:—

"These items relate to attendances on, and fees of £21, £21, and £15 15*s.* to, counsel with briefs on the trial. I have carefully studied the papers supplied to me by the solicitors, and I have given the subject all the care and consideration I could. I am

unable to alter the opinion which, in the best exercise of my judgment and discretion, I originally formed, namely, that £12 12*s*., £12 12*s*., and £8 8*s*. are the largest fees that I could reasonably and fairly allow against the party. No one for a moment questions the *bona fides* of the plaintiffs' solicitors—I certainly least of all; but I venture to submit that a duty is cast upon the Taxing Masters, especially in party and party taxations, to determine in every case whether in their judgment the fees to counsel are (to quote the language in the head note to *Robb* v. *Connor* (1)) fairly required by the magnitude or complication of the cause, and to allow or reduce the charges accordingly. In this case I considered the fees claimed were immoderate as against the party.

"Speaking from my personal experience of this subject, it seemed to me (before I was aware of the fees given to the defendants' counsel) that it would be fair and reasonable to allow, as against the party, fees of from £8 8*s*. to £12 12*s*., and I allowed the highest estimate I so formed. Subsequently I was told that the fees to the defendants' counsel were £10 10*s*., £10 10*s*., and £7 7*s*. Under the circumstances of the case I overruled the objection."

There can be no question, as the Master says, of the complete *bona fides* of the plaintiffs' solicitor in measuring these fees, and that the scale was arrived at after a deliberate estimate of the magnitude and difficulties of the case. But we think the Master has miscarried in thinking that these fees were immoderate as against the party. They are not suggestive of special fees for special counsel—nor are the senior's fees disproportionate to that of the junior. I do not for one moment adopt the argument that the Master has acted from caprice, or that he has been merely clipping. On the contrary, he seems to have arrived at his conclusion after patient and mature consideration; but we are of opinion that he has manifestly erred in his conception of the magnitude and difficulties of the case, and we shall accordingly restore those deductions.

The next items are concerned with the amount of counsels' refreshers. The Taxing Master reduced them from 10 guineas

(1) I. R. 9 Eq. 373.

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(to the seniors) and 7 guineas (to the junior) to 5 and 3 guineas respectively. The Master's report states:—

"(5). *Objection as to items* 227, 230, 233, 237, 240, *and* 243. —These items relate to the refresher fees to the plaintiffs' three counsel in the trial. They are claimed at £10 10*s.*, £10 10*s.*, and £7 7*s.* respectively. I have allowed £5 5*s.*, £5 5*s.*, and £4 4*s.* respectively, and the general reasons I have given in paragraph 4 are applicable hereto. But I desire to state the following special reasons—Order LXV., Rule 64 (44), is as follows:—

"'It shall be in the discretion of the Taxing Masters to allow reasonable refreshers to counsel in cases where refreshers might have been heretofore allowed.' The rule and practice as to refreshers are thus stated in 'Bewley on Costs,' at page 126: 'Refreshers to counsel in ordinary cases amount to at least £2 2*s.* between party and party, and may be increased under special circumstances at the discretion of the Taxing Officer.'

"In *Jessop* v. *Cusack* (1) refreshers of £8 8*s.* to the two senior counsel, and £5 5*s.* to junior counsel, were allowed by me as claimed, and the Master of the Rolls was pleased, under the circumstances of the case, to affirm my ruling; but at p. 250 of the report it will be seen his Lordship said:—'I think the Taxing Master has taken a liberal view in allowing 8 guineas to senior counsel and 5 guineas to junior counsel. It is a liberal allowance, but it was a very exceptional case.' In *Maconchy* v. *Bank of New Zealand* (2) refreshers of £15 15*s.*, £15 15*s.*, and £10 10*s.* were claimed, and, following *Jessop* v. *Cusack* (1), I reduced them to £8 8*s.*, £8 8*s.*, and £6 6*s.* In that case the Master of the Rolls was also pleased to affirm my ruling. I entertain no doubt that *Jessop* v. *Cusack* (1) and *Maconchy* v. *Bank of New Zealand* (2) were cases of far greater complication and magnitude than this case, and I apprehend that the fees I have here allowed are also liberal in the circumstances.

"*Robb* v. *Connor* (3) is, I venture to submit, also an authority on the question of refreshers. It would appear that £2 2*s.* were given to counsel in that case, and although the Master of the Rolls considered such remuneration inadequate, having regard to

(1) 25 L. R. Ir. 244. (2) [1900] 1 I. R. 22. (3) I. R. 9 Eq. 373.

the circumstances of the case, it is an indication, at all events, of what counsel at that period were in the habit of receiving and accepting, even in exceptional cases. The refresher fees now claimed are, I venture to point out, considerably in advance of those 'heretofore allowed' according to my experience, and same are, in my judgment, sometimes, as in this instance, unreasonable as against the party. Under these circumstances, exercising my discretion to the best of my ability, I consider that the refresher fees I have allowed are quite adequate as against the party, and that it would not be reasonable on my part to pass any larger fees. I therefore overruled this objection."

In these deductions we concur entirely with the Master. In *Dyott* v. *Reade* (1) the refresher was reduced from 10 guineas to 5; *In the Matter of the Armagh Election Petition* (2), from 20 guineas to 15 guineas, and from 12 guineas to 6 guineas (junior's fee), and in *Reynolds* v. *Enfield Cycle Co.* (3), from 5 guineas to 3; and these alterations were upheld by the Court. Having regard to the fees we have allowed on the briefs, I could not say that the refresher fees allowed by the Master were inadequate to the gravity of the case.

The next item is a charge of £100 as instructions for brief. The Master has reduced it to £20. The charge in the costs with reference to it represents the work done as consisting of attendances, interviews, and correspondence with occupants of shops near where the accident occurred; policemen and doctors; endeavouring to trace defendants' carter; investigating the late Dr. Barry's habits; experiments with the Bundy time-recorder; reading up medical works; investigation of Dr. Barry's books; and finally, counteracting the alleged attempts to tamper with plaintiffs' witnesses.

Before dealing with the item the Master directed plaintiffs' solicitor to furnish him with particulars of the sum charged. These particulars amount to only £55 8*s*., and they include one considerable charge of £18 18*s*. for over a week's attendance on Mrs. Barry at her house, and investigating the books and diaries of the deceased with a view to ascertain the approximate amount of his earnings. The Master's report as to this charge is as follows:—

(1) 10 I. L. T. R. 110. (2) 10 I. L. T. R. 178. (3) 3 New Ir. Jur. 205.

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"This item relates to the 'Instructions for Brief,' and is claimed at the sum of £100.

"This claim, to my mind, is obviously excessive, and is not improved by the particulars thereof annexed to the costs, amount £55 8*s*. These particulars I have carefully examined, and to a large extent they appear to me to be composed of charges which in no sense can be properly allowed against the party. It will be seen that at items 179 to 187 of the costs, I have, in accordance with item 188 of the present schedule of fees, allowed for attendances on necessary witnesses before trial of action and taking down evidence to be used thereon, amounting in all to £2 13*s*. 4*d*.

"I have given the subject of this objection all the care and attention of which I am capable, and exercising my discretion to the best of my judgment and experience, I consider that the fee of £20, which I have allowed, justly and reasonably represents the full amount of remuneration to which the solicitors are entitled.

"In forming this opinion, I have taken into consideration the several matters mentioned in said Order LXV., Rule 64 (37), and also the skill, labour, and responsibility involved in the case, provided for by 33 & 34 Vict. c. 28, s. 18."

I have to repeat as to this item what I have already said as to the care and consideration the Taxing Officer has given to this taxation. He is a far better judge than we could possibly be of the propriety of the allowance, and I would be very slow indeed to set up my opinion against his. But we have already differed from him in the estimate he formed of the magnitude of this case, and acting on our opinion, have restored the original fees on the briefs. We think that this opinion governs this item also, and that the £20 allowed to the plaintiffs' solicitor does not fully meet the importance of the case and the extra labour thrown on the solicitor under the circumstances referred to in the commencement of this judgment. We have no scale and no means for arriving at a proper sum, and what we shall do is this—we will send this item back to the Master with the expression of our opinion that the sum allowed is inadequate, and ask him, in view of that intimation, to reconsider his ruling. I may add with reference to cases in which the fee for instructions for brief was challenged, that in *Jessop* v.

Cusack (1) 15 guineas was charged as instructions. The Master reduced it to 8 guineas, and his ruling was upheld. In *Maconchy* v. *The Bank of New Zealand* (2) £300 was charged, and the Master reduced it to £50. The Master of the Rolls sent the item back for revision, and eventually by consent the officer allowed £55 5*s*.

In the next set of items the Taxing Officer has reduced the charges for service of subpœnas on witnesses from 5*s*. and 7*s*. 6*d*. to 2*s*. 6*d*. The Master's report as to this item states:—

"*Service of subpœnas.*—(6). *Objection as to items* 125, 126, 128, 130, 132, 136, 140, *and* 148.—These items are claimed for the services of subpœnas at 5*s*. and 7*s*. 6*d*. for each service. The services were all effected in the city of Limerick, and I have allowed the long-established charges therefor, namely, 2*s*. 6*d*. for each service.

"The objectors rely on item 26 of the present schedule of fees in support of the charges, but I submit that that item relates only to writs of summons or other 'process,' and that it was not intended to extend it to subpœnas. In the previous schedule of fees (item 29) the charge was limited to 'writs of summons' or 'citation,' and at page 25 of 'Bewley on Costs' it will be seen that it relates to the expenses attending the service of the summons and plaint. I apprehend that personal service of a subpœna is not essential, and that service on an adult at the residence or place of business of a witness would be sufficient. In any event, I decline, without the sanction of the Court, to depart from a practice which, as well as I can recollect, has not heretofore been questioned, and to increase a charge which has been recognised as the proper remuneration. I need hardly add that in cases of difficulty of service, adequate allowances would be made. Under these circumstances I overruled the objection."

I agree with the Master that item 26 of the present schedule of fees does not apply to subpœnas for service on a witness. It seems to contemplate the service of certain documents on a party to the suit, and though the term "writ" is comprehensive enough to include a subpœna, I do not think it was intended to do so. The Master certifies that the established charge is 2*s*. 6*d*., and that the

(1) 25 L. R. Ir. 244. (2) [1900] 1 I. R. 22.

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practice of only allowing that sum is one of long standing in the Taxing Office. We therefore affirm his ruling.

The last items in controversy are allowances for two witnesses, namely, Mr. Patrick Kearney, who is stated to be a Railway Traffic Superintendent, and Mr. Gaffney, the plaintiffs' solicitor. The former's attendance at the trial is charged for at the rate of £1 a day for seven days. The Taxing Officer has allowed 17*s.* 6*d.* a day, and in his report says that perhaps it is in excess of what the witness is strictly entitled to. According to the scale of fees, Order LXV., Rule 64, No. (11) D (Wylie, 874), the Taxing Officer may allow to engineers, bankers, merchants, and other like witnesses, if resident beyond 10 miles from the place of trial, a sum not exceeding £1 a day. The charge in the bill of costs for this witness has presumably been made on the assumption that he comes within this category. I am of opinion that he does not—and that if he comes under any of the specific items in this rule, it must be under "C," which allows a sum not exceeding 10*s.* a day. It is a question whether he is outside all the named classes, and comes within "F." In any case, the Taxing Officer had a discretion as to the amount, with which we decline to interfere. As to Mr. Gaffney, the plaintiffs' solicitor, he claims in the bill of costs not only the fees properly payable to him as the solicitor on record for attending the trial in Dublin, amounting altogether to £7 19*s.* 4*d.*, but also allowances and travelling expenses as a witness, amounting to £22 1*s.* These allowances are calculated at £3 3*s.* a day for seven days. Before both the Taxing Officer and this Court, Mr. Gaffney offered to reduce the £22 1*s.* by £6 19*s.* 4*d.*, part of the £7 19*s.* 4*d.*—in other words, to claim merely as a witness. The Taxing Officer has disallowed this claim as a witness. Three cases were cited to us on the question of this disallowance—viz. *Heffernan* v. *Vaughan* (1), *Colhoun* v. *M'Namee* (2), and *Craig* v. *Boyd* (3), but I do not think that any of them can assist us on a point that must depend on its own special circumstances. Mr. O'Shaughnessy, who directed proofs, has candidly told us that he did not direct Mr. Gaffney's attendance at the trial, as he thought that Mrs. Barry, the

(1) 18 I. L. T. R. 38. (2) 1 New Ir. Jur. 275. (3) [1901] 2 I. R. 645.

widow of the deceased, would be able to give all the evidence that Mr. Gaffney might be supposed to be able to give. Mr. Gaffney did not come to Dublin as a witness. He came in his capacity of solicitor alone; but at consultation it was determined, as Mr. O'Shaughnessy has also told us, that either Mr. Gaffney or an accountant should be produced, who would depose to the figures found in the deceased gentleman's books with reference to his earnings. Whether or not this was the result of a suggestion from the Lord Chief Justice, who was trying the case, I am not sure; but suffice it to say, that Mr. Gaffney was not examined until just towards the close of the trial. Under these circumstances we think that the Taxing Officer was right in merely allowing the proper fees for his attendance as solicitor on the record.

BARTON and WRIGHT, JJ., concurred.

Solicitors for the plaintiff: *P. S. Connolly & Co.*
Solicitor for the defendant: *F. M. Fitt.*

R. ST. J. C.

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June 10.

THE KING (M'CLINCHY) *v.* GREER (1).

Licensing law—Licensing (Ireland) Act, 1902 (2 *Edw.* 7, *c.* 18), *s.* 6—*Adjoining premises—Certificate granted for new license in contravention of Act—Refusal of Excise authorities to issue license—Mandamus—Form of certificate under* 2 *Edw.* 7, *c.* 18.

A mandamus will not lie to compel the collector of Inland Revenue to issue an Excise license for the sale of spirits, in pursuance of a certificate granted by the magistrates at Quarter Sessions, where such certificate was granted without jurisdiction, even though the certificate is, on its face, a valid one.

The Queen v. *O' Connell* (20 L. R. Ir. 625) distinguished.

Quære—Whether, since the passing of the Licensing (Ireland) Act, 1902, a certificate of the magistrates granting a license should not show on its face that the case comes within some of the exceptions in that Act.

MANDAMUS.

This was an application by the prosecutor to make absolute, notwithstanding cause, a conditional order for a writ of mandamus directed to the respondent, the collector of Inland Revenue at Londonderry, commanding him to issue to the prosecutor an ordinary publican's Excise license in respect of premises in the Main-street of Buncrana, county Donegal, in pursuance of the certificate granted by the Chairman and Justices of County Donegal at Quarter Sessions.

The affidavit of the prosecutor, on which the conditional order was obtained, set out that he was the owner of premises in the Main-street of Buncrana, and as such had applied to the Chairman and Justices of the County of Donegal, at the Quarter Sessions for the Division, on the 22nd January, 1903, for a new license in respect of such premises, he having purchased the interest of a Mrs. Doherty in her license for premises a few doors off in the same street. The prosecutor was examined in support of the application. There was no opposition, and the Chairman directed

(1) Before PALLES, C.B., and ANDREWS, BARTON, and WRIGHT, JJ.

Mrs. Doherty's license to be handed in to the Clerk of the Peace, which was done, and the application was granted. The Clerk of the Crown and Peace issued a certificate in the form prescribed by section 5 of 3 & 4 Wm. 4, c. 68. The prosecutor sent this certificate, together with the proper amount of duty, to the Inland Revenue authorities, but they refused to issue an Excise license on the authority of the certificate, alleging as a reason that the circumstances were similar to those of the case of *The King* (*Hunter*) v. *Justices of Donegal* (1), in which the King's Bench Division had quashed the certificate. An affidavit was filed by the respondent by way of cause, which set out that the premises mentioned in the certificate were quite distinct and apart from the premises the license of which was stated to have been purchased from Mrs. Doherty, and distant therefrom over twenty yards, and that between the two sets of premises three dwelling-houses intervened, occupied by other persons. Deponent stated that he refused to issue the license under directions received by him from the Commissioners of Inland Revenue.

The Solicitor-General (with him *Coll*), for the respondent :—

We submit, first, that the certificate is bad on its face, as not showing that the case is one in which the Justices have jurisdiction under 2 Ed. 7, c. 18, and that, therefore, the Inland Revenue authorities were bound to refuse to act upon it. Secondly, we say that, even assuming the certificate to be good on its face, the Court will not, under the circumstances, grant a mandamus. The Justices had no jurisdiction to grant the certificate: *The King* (*Kennedy*) v. *Justices of Antrim* (2); *The King* (*Hunter*) v. *Justices of Donegal* (1). If a license were issued on this certificate it would be null and void: *Thompson* v. *Harvey* (3). The Court will not grant a mandamus to compel a public body to do an act which would be inoperative; it must appear that the mandamus will be practically effective: Shortt on Mandamus, p. 246.

P. Law Smith (with him *Henry, K.C.*), for the prosecutor :—

The duty of the collector of Inland Revenue in granting a

(1) 3 New Ir. Jur. 114 n. (2) [1903] 2 I. R. 671. (3) 4 H. & N. 254.

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new license is ministerial merely, and not judicial. In the *Queen* v. *O'Connell* (1) the Court granted a mandamus to compel the issue of a license, although of opinion that the order granting the certificate was bad. If the Inland Revenue authorities wished to raise the point as to the validity of the certificate, they should have applied for a writ of *certiorari*.

PALLES, C.B., delivered the judgment of the Court:—

We do not think it necessary to call upon Mr. Coll. We are all of opinion that we cannot direct the mandamus to issue. For myself I desire to say that I think it is very necessary that the attention of the learned County Court Judges should be called to the effect of this Act of 1902 upon the form of the certificate for a publican's license given in the 5th section of 3 & 4 Wm. 4, c. 68. When the last-mentioned Act was passed the licensing authority had jurisdiction to determine whether any person in occupation of a house was entitled to receive an ordinary license in respect of such house, and therefore the words used in the certificate prescribed by that Act showed jurisdiction upon the face of it. But the Act of 1902 contains in the 2nd section general negative words:—"From and after the passing of this Act no license shall be granted for the sale of intoxicating liquors, whether for consumption on or off the premises," except for certain premises described in the section. Thus the jurisdiction to grant a license to sell in *any* house ceased to exist. The jurisdiction was narrowed to premises answering one of certain particular descriptions. Where such a vast amount of property depends on the validity of these licenses, and having regard to the ordinary rule applicable to documents of this description issued by inferior tribunals, viz. that they should show jurisdiction on their face, it seems to me to be well worthy of consideration whether this Act of 1902 does not necessitate a certain alteration in the form of certificate, either by describing the premises as premises that were licensed within the dates mentioned in the 2nd section, or otherwise bringing the premises within the description in the Act of those excepted from the general operation of the 2nd section.

(1) 20 L. R. Ir. 625.

Having said so much, I shall assume, for the purposes of my judgment (though I have grave doubts on the subject), that the certificate here is on its face valid, that is, that it shows sufficient jurisdiction on its face. The present application then is for a mandamus to the collector of Inland Revenue to issue the ordinary publican's Excise license in respect of certain premises in Buncrana, in pursuance of the certificate granted by the Chairman and Justices at Quarter Sessions. The answer of the collector is that the premises were not previously licensed; that they did not come within any of the other exceptions in the Act of 1902; and that consequently the Justices were without jurisdiction to enter on the consideration of the application for the certificate, and that their order and certificate are wholly void. I agree in this contention of the collector. I am of opinion that there was no jurisdiction to enter on the consideration of the application, and that the certificate is absolutely void. What then is the effect of it? It is said that as I assume it to be valid on its face, and as it has not been impeached on *certiorari*, I should, for the purpose of this motion, hold it to be valid. But it is settled law that the absence of jurisdiction to make an order by an inferior Court good on its face can be shown, although it has not been quashed on *certiorari*, if such absence of jurisdiction is not founded on *bias* or interest intrinsic in the tribunal. In such a case the order is void *ab initio*. The *certiorari* does not in such a case make that void which when made was voidable only. It does no more than remove from the records of the inferior Court that which was null and void from its inception. If the question of the validity of this document arose at *Nisi Prius*, the Judge would be obliged to hold it null and void, although it had not been quashed on *certiorari*, and it is preposterous to suggest that this Court will direct the prerogative writ of mandamus to issue for the purpose of enforcing obedience to a void order.

The *Queen* (*Cusack*) v. *O'Connell* (1) is not in point here. The Court there held that although the majority of the Justices were against the granting of the certificate, yet as that majority did not cause an entry of "refused" to be made in the Petty Sessions

(1) 20 L. R. Ir. 625.

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Palles, C.B.

Book, they were to be taken to have acquiesced in the view that the signatures of "two" Justices were sufficient. This fact must have been treated by the Queen's Bench as such a withdrawal of, or non-insistence by the majority upon, their view as to constitute the majority of two (who signed the certificate) the Court. This at least is the only principle on which that case can be supported.

We allow the cause shown and discharge the conditional order.

Solicitor for the prosecutor: *Hugh C. O'Doherty.*

Solicitor for the respondent: *The Solicitor for Inland Revenue.*

J. G. T.

K. B. Div. 1903.

Nov. 26.

CONLON, APPELLANT; MULDOWNEY, RESPONDENT (1).

Licensing law—Sale of intoxicating liquor to children—Sale by assistant without knowledge and contrary to orders of licensee—Intoxicating Liquor (Sale to Children) Act, 1901 (1 *Edw.* 7, *c.* 27), *s.* 2.

M., a publican, was charged, under 1 Edw. 7, c. 27, with having allowed his barman knowingly to sell and deliver intoxicating liquor to a girl under fourteen for consumption off the premises, the same not being in a corked or sealed vessel. M. had given orders to his assistants not to supply liquor to children in contravention of the statute. The liquor in the present case was sold by M.'s barman, M. himself not being in the shop at the time, though his foreman was. The magistrate held as a fact, on the evidence, that the sale of intoxicating liquor to the child was knowingly effected by the barman, but without the knowledge, actual or constructive, or the wilful connivance of M. or his foreman, and he dismissed the summons:—

Held, that M. had not knowingly allowed the intoxicating liquor to be sold within the meaning of the Act, and that the summons was properly dismissed.

CASE STATED under 20 & 21 Vict. c. 43.

At the Dublin Metropolitan Police Court on the 27th September, 1903, before Mr. Swifte, one of the Divisional Justices,

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and GIBSON, JJ.

the respondent, the holder of a publican's license, was charged on summons at the suit of the appellant, a sergeant in the Dublin Metropolitan Police, for having allowed his barman or assistant knowingly to sell and deliver certain intoxicating liquor, to wit, porter, to a girl under the age of fourteen years, for consumption off the premises, the same not being in a corked and sealed vessel or vessels, but in three unsealed bottles, contrary to 1 Ed. 7, c. 27. At the hearing a preliminary objection was taken that the summons was defective in form for not containing the word "knowingly" before the word "allow." No application was made to amend the summons, and Mr. Swifte stated that the point seemed to him a well-grounded one, but that in the result it became unnecessary for him to decide it. Evidence was given that three bottles of porter had been sold in respondent's public-house to a girl aged twelve years, by an assistant of the respondent named Martin Donovan, and had been taken away by the girl in unsealed bottles. The respondent was not in the shop himself at the time, but his foreman, Sylvester Muldowney, was. A notice was hung up in the shop stating that "The Sale of Intoxicating Liquors to Children Act, 1901, makes it an offence for any licensee to knowingly sell or deliver, or allow any person to sell or deliver, any description of intoxicating liquor to any child under fourteen years of age for consumption on or off the premises, except it be in corked and sealed vessels, in quantities not less than one reputed pint." Donovan admitted that the respondent had given him orders not to supply any liquor to children in contravention of the Act. The magistrate held as a fact "that the said sale of intoxicating liquor to the said child was 'knowingly' effected by Martin Donovan, but without the knowledge, actual or constructive, or the wilful connivance of the said foreman, Sylvester Muldowney, and therefore in law without such knowledge or connivance on the part of the defendant," and he accordingly dismissed the summons.

The present case was stated on the application of the complainant in the summons, the judgment of the Court being required as to whether the magistrate was correct in point of law in his determination, or as to what should be done in the premises.

K. B. Div. 1903.

CONLON v. MULDOWNEY.

Cecil Atkinson (with him the *Solicitor-General*), for the appellant :—

We admit that the facts here are indistinguishable from those in *Emary* v. *Nolloth* (1); we submit, however, that that case was wrongly decided. It is necessary to delegate authority in order to enable the assistant to sell, and once authority is delegated the principal becomes responsible for the acts of the person to whom his authority is delegated; the knowledge of the assistant must be imputed to the principal. The fact that the respondent gave orders to his assistants not to sell in contravention of the statute is immaterial. [He referred to *Commissioners of Police* v. *Cartman* (2); *Mullins* v. *Collins* (3); *Coppen* v. *Moore* (No. 2) (4); *The Queen* v. *Stephens* (5); *Sherras* v. *De Rutzen* (6); Article in 62 J. P. at p. 658.]

John O'Mahony, for the respondent :—

This is a penal statute, and must be strictly construed. The word "or" in section 2 of the Act is conjunctive, and not disjunctive, and the word "knowingly" governs the words "allows any person to sell or deliver." A person cannot be said to allow an act of which he has no knowledge: *Somerset* v. *Wade* (7); *Somerset* v. *Hart* (8). There must in general be guilty knowledge on the part of the defendant, or of some one whom he has put in his place to act for him: *Sherras* v. *De Rutzen* (6), *per* Wright, J. Here the person put in the respondent's place was Sylvester Muldowney, and not Donovan. *Emary* v. *Nolloth* (1) was well decided, and should be followed. [He also referred to *Groom* v. *Grimes* (9); *Worth* v. *Brown* (10).]

The Solicitor-General, in reply :—

The intention of the section is to make the publican responsible not merely for what he does himself, but for what is done by persons in his employment, otherwise the statute would be abor-

(1) [1903] 2 K. B. 264.
(2) [1896] 1 Q. B. 655.
(3) L. R. 9 Q. B. 292.
(4) [1898] 2 Q. B. 306.
(5) L. R. 1 Q. B. 702.
(6) [1895] 1 Q. B. 918.
(7) [1894] 1 Q. B. 574.
(8) 12 Q. B. D. 360.
(9) 89 L. T. (N. S.) 129.
(10) 40 Sol. J. 515.

tive. The section contemplates two offences, one where the publican knowingly sells or delivers, "knowingly" there meaning with knowledge of the age of the child; coming to the other offence created by the section, "knowingly" should be given the same meaning, and the section be read as meaning allowing another person knowingly to sell.

LORD O'BRIEN, L.C.J.:—

This case has been very elaborately argued. It is not a case where the holder of a license puts a man into a public-house as his *alter ego*, to whom knowledge is brought home. The present is a case where the sale is by a person more or less in the position of a servant. Let me take the words of the section:—"Every holder of a license who knowingly sells or delivers, or allows any person to sell or deliver . . ." It is perfectly plain that the word "knowingly" governs the words "allows any person to sell or deliver" as well as the words "sells or delivers," that is to say, there must be knowledge, *mens rea*. But in this particular case knowledge is negatived. The magistrate states as follows:—"Upon the evidence and arguments so addressed to me I hold as a fact that the said sale of intoxicating liquor to the said child was 'knowingly' effected by Martin Donovan, but without the knowledge, actual or constructive, of the said foreman, Sylvester Muldowney, and therefore in law without such knowledge or connivance on the part of the defendant, and I accordingly dismiss the summons." Nothing could be more explicit than that. No knowledge was brought home to the defendant within the meaning of the Act of Parliament. I think Mr. O'Mahony's argument is well founded, and that the magistrate was correct in point of law in his determination. We give the defendant costs. The view we take is supported by the high authority of Lord Alverstone in the English case of *Emary* v. *Nolloth* (1).

ANDREWS and GIBSON, JJ., concurred.

Solicitor for the appellant: *Sir P. Coll.*
Solicitor for the respondent: *J. L. Burke.*

J. G. T.

(1) [1903] 2 K. B. 264.

K. B. Div. 1904. Feb. 2, 25, 26.

IRISH LAND COMMISSION *v.* VISCOUNT MASSEREENE AND FERRARD (1).

(1903. No. 13,405.)

Variable rent—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 90—*First gale to which the statute applies—Church Temporalities Acts—Tithe Rentcharge (Ireland) Act*, 1900 (63 & 64 *Vict. c.* 58), *ss.* 2, 3—*Construction of statutes—Whether retrospective—"Gale of rent"—"Accrued due"—Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35), *s.* 2.

Sect. 90 of the Irish Land Act, 1903, enacts that "where, by reason solely of the non-publication of the average prices of produce in the *Dublin Gazette*, it has become impossible, in the absence of other provisions, to determine the amount by which any variable rent, calculable upon an average of prices, should be varied, sections 2 and 3 of the Tithe Rentcharge (Ireland) Act, 1900, shall apply as from the commencement of this Act in the case of such variable rents, and the words tithe rentcharge in the said sections shall be deemed to include any variable rent as aforesaid." Section 102 enacts that the Act shall come into operation on the 1st November, 1903. Section 3 of the Tithe Rentcharge (Ireland) Act, 1900, enacts that during the period of fifteen years dating from the 1st November next after the passing of the Act, the sum payable in respect of every gale accruing due after that date of any tithe rentcharge shall be deemed to be varied in accordance with the provisions therein mentioned.

The defendant held certain lands under a perpetuity grant, made pursuant to the Church Temporalities Acts, at a variable rent, payable quarterly on the 1st February, 1st May, 1st August, and 1st November:—

Held, that sect. 90 of the Irish Land Act, 1903, did not apply to the gale of rent falling due on the 1st November, 1903, and that the defendant was not entitled to a variation in respect of the quarterly gale which fell due on that date.

SPECIAL CASE stated under Order XXXIV. for the opinion of the Court on a question of law arising in the action. The action was brought for the recovery of the sum of £434 8s., the amount of three quarterly gales of rent payable under a perpetuity grant on the 1st May, 1903, 1st August, 1903, and 1st November, 1903,

(1) Before JOHNSON, GIBSON, KENNY, and WRIGHT, JJ.

respectively. The question involved was with respect to the last-mentioned quarterly gale, viz. that payable on the 1st November, 1903.

The following are the material facts and statutes, as set out and referred to in the special case:—

By a grant in perpetuity, dated the 21st day of March, 1872, and made between the Commissioners of Church Temporalities in Ireland (hereinafter called the Commissioners) of the one part, and the Right Hon. Clotworthy John, Viscount Massereene and Ferrard (hereinafter called the grantee), the defendant in this action, of the other part (being a grant made pursuant to the provisions of the Church Temporalities (Ireland) Acts), certain hereditaments in the county of Antrim were granted unto the grantee, his heirs and assigns for ever, subject to the yearly rent of £579 4*s.* 1*d.*, or such increased or diminished yearly rent or sum as should from time to time thereafter be substituted therefor pursuant to the provisions of the said Acts, the said reserved yearly rent, or such increased or diminished yearly rent so to be substituted as aforesaid, to be paid and payable by four quarterly payments on every 1st day of February, 1st day of May, 1st day of August, and 1st day of November in each and every year, clear over and above all taxes and impositions whatsoever. And the grantee covenanted with the said Commissioners and their successors to pay the said yearly rent, or such other rent as should or might be substituted therefor, upon and at the dates and times before mentioned as the same should become due and payable. The grant contained a declaration that the Commissioners had, pursuant to the provisions of the said Acts, calculated and ascertained upon the returns advertised in the *Dublin Gazette* for a period of ten years immediately preceding the 1st of May, 1871, the average price of oats, being the corn principally grown in the said county of Antrim, for the said period of ten years, and had ascertained said average price to be fourteen shillings and one penny per barrel, and that the Commissioners had, at the request of the grantee, directed the said average price of fourteen shillings and one penny per barrel to be inserted in the said grant pursuant to the provisions of the said Acts.

By section 142 of the 3 & 4 Wm. 4, c. 37 (being one of the

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said Temporalities Acts), it was enacted that at any time within four months from the expiration of seven years, to be computed from the 1st of May next preceding the execution of any grant made pursuant to the provisions of the Church Temporalities Acts, and in like manner at any time within four months after the expiration of every subsequent period of seven years, it should be lawful for the grantor or grantee respectively under the said grant to apply to have the rent varied in the manner prescribed by the Act according to the average price of wheat or oats for the term of seven years next preceding the 1st of May next before the application. Such average price to be ascertained from the *Dublin Gazette*.

By virtue of the Irish Church Amendment Act, 1881, and of an Order in Council made under the provisions thereof, and dated the 12th day of September, 1881, all lands, tenements, and hereditaments, and every estate and interest therein belonging to the said Commissioners of Church Temporalities, did, on the 13th day of September, 1881, become, and at time of action brought were, vested in the plaintiffs the Irish Land Commission as in the said Act is set forth, and the plaintiffs became on the said date, and at the time of action brought were, entitled to the benefit of all covenants, conditions, or agreements, express or implied, in relation to the premises so transferred, and to maintain all actions, suits, and other proceedings grounded thereon in their own name.

No variation was ever made in respect of the rent reserved by the said grant pursuant to the provisions of the said Church Temporalities Acts.

From the 1st of September, 1887, the *Dublin Gazette* ceased to publish returns showing the average prices of corn in Ireland.

By the Irish Land Act, 1903, section 90, it was enacted as follows:—"Where, by reason solely of the non-publication of the average prices of produce in the *Dublin Gazette*, it has become impossible, in the absence of other provision, to determine the amount by which any variable rent, calculable upon an average of prices, should be varied, sections 2 and 3 of the Tithe Rent-Charge (Ireland) Act, 1900, shall apply as from the commencement of this Act in the case of such variable rents, and the words 'tithe rent-charge' in the said sections shall be deemed to include any variable rent as aforesaid."

By section 102 of the Irish Land Act, 1903, it is enacted that the Act shall come into operation on the 1st of November, 1903.

The material portions of section 2 of the Tithe Rentcharge (Ireland) Act, 1900, referred to in section 90 as aforesaid, are as follows:—"2. (1.) As soon as possible after the passing of this Act the Land Commission shall ascertain, from the appendices to their reports as presented to Parliament in pursuance of section fifty-five of the Land Law (Ireland) Act, 1881, by what amount in each county during the period commencing with and including the year covered by the annual report, dated the twentieth day of September, one thousand eight hundred and eighty-six, and ending with that presented last before the passing of this Act, the rents of holdings in respect of which judicial rents have been fixed for a first statutory term, whether by order or by agreement, have for the entire of such period been varied by the fixing of such judicial rents, and shall certify the average percentage which such variation represents." "(2). The Land Commission shall similarly ascertain and certify for each county in respect of every subsequent period of fifteen years, the average percentage of variation of judicial rents payable during a second or subsequent statutory term as compared with the judicial rents payable during the last preceding statutory term."

Section 3 of the Tithe Rentcharge (Ireland) Act, 1900, referred to in section 90 as aforesaid, is as follows:—"3. (1.) During the period of fifteen years dating from the 1st day of November next after the passing of this Act, the sum payable in respect of every gale accruing due after that date of any tithe rentcharge, payable out of hereditaments situate in any county, shall be deemed to be varied from the amount at which it stood on the twenty-second day of August, one thousand eight hundred and eighty-four, in accordance with the average percentage of variation of rents declared by the certificate of the Land Commission to have taken place with respect to such county by the fixing of judicial rents for a first statutory term, and shall be payable accordingly." "(2). During each subsequent period of fifteen years the like variation shall be deemed to be made in all tithe rentcharges from the amount at which they respectively stood

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immediately before the commencement of such period in accordance with the average percentage of the variation of judicial rents certified by the Land Commission for the period of fifteen years terminating last before the commencement of each such first-mentioned period respectively, and all tithe rentcharges shall be payable accordingly." "(3). After the passing of this Act no variation shall be made in any tithe rentcharge save in accordance with the provisions of this Act."

The Irish Land Commission duly ascertained, in accordance with section 2 of the Tithe Rentcharge (Ireland) Act, 1900, by what amount in each county judicial rents had been varied during the period mentioned in the said section, and duly published their certificates of such variation, and by their certificate dated the 25th of October, 1900, certified that the average percentage of variation for the county of Antrim (being the county in which the lands comprised in the said grant are situated) was 21.7 per cent.; according to such percentage the quarterly gales of rent payable under the said grant would, by virtue of section 90 as aforesaid, in future be reduced from the sum of £579 4*s.* 1*d.* (being the amount at which they stood on the 22nd August, 1884) to the sum of £453 10*s.* 5*d.*

The questions for the opinion of the Court were :—

1. Is the defendant entitled, under the provisions of section 90 of the Irish Land Act, 1903, to a variation in the quarterly gale of rent payable under the said grant, which fell due on the 1st of November, 1903?

2. If the defendant is not entitled to a variation in the gale falling due on the 1st of November, 1903, what is the first gale in respect of which he will be so entitled?

3. For what period of time will the defendant be entitled to the variation effected under section 90 as aforesaid? Will it be twelve or fifteen years from the date of the passing of the Irish Land Act, 1903?

If the Court were of opinion that question 1 should be answered in the negative, then judgment was to be entered for the plaintiffs for the full amount endorsed on the writ of summons, but without costs.

If, on the other hand, the Court were of opinion that the said question should be answered in the affirmative, then the Court was to give judgment for the sum of £402 19*s.* 7*d.*, but without costs.

Chaytor (with him *Ronan, K.C.*), for the plaintiffs:—

The gale payable on the 1st November, 1903, is not affected by the provisions of section 90 of the Irish Land Act, 1903. Section 3 of the Tithe Rentcharge (Ireland) Act, 1900, was clearly prospective and not retrospective in its original operation, and applied only to gales accruing due after the 1st November next after the passing of the Act, that is, after the 1st November, 1900. If section 90 of the Irish Land Act, 1903, is to be taken as applying section 3 of the Act of 1900 literally, it would give a retrospective operation to the provisions so as to apply to all past gales of variable rents accrued due since 1st November, 1900. It will scarcely be contended that this was the intention of the Legislature. A statute is not to be construed so as to have a retrospective operation unless the language plainly requires such construction: Hardcastle on Statutes, p. 352; *Lauri* v. *Renad, per* Lindley, L.J. (1); *Gardner* v. *Lucas, per* Lord Hatherley and *per* Lord O'Hagan (2). We submit that in applying sect. 3 of the Act of 1900 to variable rents under the provisions of sect. 90 of the Act of 1903, such application must be prospective to the same extent as sect. 3 of the Act of 1900 originally was prospective in its application to tithe rentcharge. Upon this construction it would apply only to gales accruing due after the passing of the Act of 1903. The Act of 1903 came into force immediately after midnight on the 31st October, 1903: Interpretation Act, 1889, sect. 36, sub-sect. 2. The whole of the gale in question, which was payable upon the 1st November, 1903, had accrued due at midnight on the 31st October. It had therefore accrued due when the Act came into force, and is not affected by sect. 90. By the Apportionment Act, 1870, sect. 2, after the passing of that Act all rents are to be considered as accruing from day to day. The section applies to the liability to pay, as well as the right to

(1) [1892] 3 Ch. 402, at p. 421. (2) 3 A. C. 582, at pp. 597, 601.

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receive, rent: *In re Leeks* (1); *Glass* v. *Patterson* (2); *In re South Kensington Co-operative Stores* (3).

Jellett, K.C., and *Bewley*, for the defendant:—

The defendant is entitled to have the gale payable on the 1st November, 1903, varied under section 90 of the Irish Land Act, 1903. It is not necessary for the purpose of our contention that the Act should be given a retrospective construction; we contend that the gale of rent in question accrued due after that Act came into force. The question resolves itself into the meaning of the words "gale" and "accruing due." A gale means the aggregate sum of money payable in respect of the period; it is not ascertained and has no existence until the gale day arrives. The only effect of the Apportionment Act, 1870, as to the meaning of the word gale is that instead of being an entire thing it is an aggregate of many distinct things: *Glass* v. *Patterson*, *per* Palles, C.B. (4). It is still, however, an aggregate. The words "accruing due" in section 3 of the Tithe Rentcharge Act, 1900, mean becoming payable. That this is so is shown by section 6 of that Act, where the expression "accrues due" plainly means becomes or is payable. Rent, however, is not payable until midnight of the gale day upon which it is reserved: Furlong's Landlord and Tenant, 2nd ed., p. 396; *Cutting* v. *Derby* (5); note to *Duppa* v. *Mayo* (6); note to *Ex parte Smyth* (7); 7 Bac. Ab. 26; Co. Litt. 202*a*; Shep. Touch. 472; *Lord Rockingham* v. *Penrice* (8); *Southern* v. *Bellasis* (9); *Norris* v. *Harrison* (10); *Leftley* v. *Mills*, *per* Kenyon, C.J. (11). *Dibble* v. *Bowater* (12) was decided on a particular statute, and has no general application; at all events, if it is to be regarded as a decision that rent is payable before midnight of the day on which it is reserved, it is contrary to all the authorities. The gale of rent therefore in question here was not payable until midnight on the 1st November, 1903, prior to

(1) [1902] 2 I. R. 339.
(2) *Ibid.* 660.
(3) 17 Ch. D. 161.
(4) [1902] 2 I. R. 660, at p. 681.
(5) 2 W. Bl. 1075.
(6) Wms. Saund. at p. 455.
(7) 1 Swanst. at p. 443.
(8) 1 P. W. 177.
(9) *Ibid.* note, p. 178.
(10) 2 Madd. 268.
(11) 4 T. R. 170, at p. 173.
(12) 2 E. & B. 564.

which time the Act of 1903 had come into operation, having come into operation immediately after midnight on the 31st October. [They also referred to *Ex parte County Council of the West Riding of Yorkshire* (1); *Sidebotham* v. *Holland* (2).]

Ronan, K.C., in reply.

Cur. adv. vult.

Feb. 26.

JOHNSON, J. :—

This is a special case stated under Order XXXIV. for the opinion of the Court on a question of law arising in an action by the Irish Land Commission against Lord Massereene and Ferrard, for three quarterly gales of rent under a perpetuity grant of 21st March, 1872, by the then Commissioners of Church Temporalities in Ireland to the defendant, of lands in the county of Antrim. The question of law to be decided by the Court is that stated by the first question submitted by the case, and on that question alone I give my opinion. The second and third questions submitted do not arise in the present action, and on them I offer no opinion. The action was commenced on the 25th November, 1903. The rent reserved by the perpetuity grant was £579 4*s.* 1*d.*, or such increased or diminished yearly rent or sum as should from time to time thereafter be substituted therefor, pursuant to the provisions of the Church Temporalities (Ireland) Acts then in force. "The said reserved yearly rent, or such increased or diminished yearly rent so to be substituted as aforesaid, to be paid and payable by four quarterly payments on every 1st day of February, 1st day of May, 1st day of August, and 1st day of November in each and every year, clear over and above all taxes and impositions whatsoever," and the grantee covenanted to pay the said rent at the days and times before mentioned as same should become due and payable. In the grant the grantors, pursuant to the Church Temporalities (Ireland) Acts, calculated and ascertained from the returns advertised in the *Dublin Gazette* for a period of ten years immediately preceding 1st May, 1871, the average price of oats (being the corn principally grown in county Antrim) at the rate in the grant declared.

(1) 6 *Times* L. R. 265. (2) [1895] 1 Q. B. 378.

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Johnson, J.

By the Church Temporalities (Ireland) Act, 3 & 4 Wm. 4, c. 37, at any time within four months from the expiration of seven years from the 1st May next preceding the perpetuity grant (in the present case 1st May, 1871), and in like manner at any time within four months after the expiration of every subsequent period of seven years, the grantors or grantee might apply to have the rent varied in the manner and by the procedure prescribed by the Act according to the average price of corn (oats in the present case) published in the *Dublin Gazette*. The reserved rent was never varied, and, as the *Dublin Gazette* from 1st September, 1887, ceased to publish the average price of corn, variation of the rent became impossible under the provisions of the 3 & 4 Wm. 4, c. 37. By the Irish Church Amendment Act, 1882, the now plaintiffs the Irish Land Commission represent, and (so to speak) stand in the shoes of, the former Commissioners of Church Temporalities in Ireland, and in order to make provision for the variation of variable rents, which had become impossible by the default of the publication of corn averages in the *Dublin Gazette*, it was provided by sect. 90 of the Irish Land Act, 1903 (3 Ed. 7, c. 37), passed on the 14th August, 1903, to "come into operation on the 1st November, 1903," that—"where by reason solely of the non-publication of the average prices of produce in the *Dublin Gazette*, it has become impossible in the absence of other provisions to determine the amount by which any variable rent calculable upon an average of prices should be varied, sections 2 and 3 of the Tithe Rentcharge (Ireland) Act, 1900" (63 & 64 Vict. c. 58), "shall apply *as from the commencement of this Act* in the case of such variable rents, and the words 'tithe rentcharge' in the said sections shall be deemed to include any variable rent as aforesaid." The rent reserved by the perpetuity grant in this case is a variable rent within the Act of 1903, section 90. By virtue of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), sect. 36, sub-sect. 2, and sect. 102 of the Act of 1903, sect. 90 of the Act of 1903 came into operation "immediately on the expiration" of the 31st October, 1903, and for the effect of sect. 90 of the Act of 1903 we are referred back to the Tithe Rentcharge (Ireland) Act, 1900, sects. 2 and 3, reading in those sections the word "rent" for the word "rentcharge."

Under these circumstances the question now to be decided is whether the defendant is entitled, under the provisions of sect. 90 of the Irish Land Act, 1903, to a variation in the quarterly gale of rent payable under the perpetuity grant which fell due on the 1st of November, 1903, and in my opinion that question is to be answered in the negative.

The Act of 1900, sect. 3, sub-sect. (1), enacts that, during the period of fifteen years, dating from (and therefore exclusive of) the 1st day of November next after the passing of the Act of 1900 (which was passed 14th August, 1900), the sum payable in respect of every gale accruing due after that date of any tithe rentcharge payable out of hereditaments in any county shall be deemed (*i.e.* considered or adjudged) to be varied as provided by the Act of 1900; and by sub-sect. 2, so on during every like subsequent period of fifteen years. It is common knowledge that the expression "gale of rent" means a periodical reservation of the rent, whether quarterly, half-yearly, or yearly, as the case may be, which, by the common law, was a distinct debt, due and payable on the day on which it was reserved, usually termed (in Ireland at all events) the gale day; but the tenant or person liable to pay the rent has the whole of that day to pay the rent. The Apportionment Act, 1870, altered the law in this respect by enacting that all rents shall, like interest on money lent, be considered as accruing from day to day, consequently the quarterly gale of rent in question is to be considered as accruing day by day from the end of the previous gale due and payable on the 1st August, 1903, until it became and was due and payable on the commencement of the 1st November, 1903. As the Act of 1903 only came into operation on the 1st November, 1903, it would, I think, require a retrospective construction of sect. 90 of the Act of 1903 in order that it should be applicable to rent which had accrued day by day from the previous 1st August, 1903, and ended on the first moment of the 1st November, 1903, or even if the words "every gale of rent" in the Act of 1900 were construed to mean, as I think they do not, a distinct debt due and payable to the plaintiffs at the first moment of 1st November, 1903. Such retrospective construction can only be warranted by plain and clear words in the Act to that effect: see the judgment of Lindley, L.J., in *Lauri* v.

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Renad (1); and though section 90 of the Act of 1903 is a remedial enactment, I find nothing in that section to show that it was intended to have such retrospective operation, and deprive the plaintiffs of their vested right to receive and recover the rent due and payable on the first moment of the 1st November, 1903. The statutable variation of the rent only takes place during the period of fifteen years prescribed by the Act of 1900, sect. 3, sub-sect. 1, as applied to sect. 90 of the Act of 1903, and in my opinion sect. 90 of the Act of 1903 is not retrospective, and does not operate on the rent in question, which, therefore, is not within the prescribed period of fifteen years, and is not varied or variable.

Gibson, J.:—

The only question we propose to answer is the first, whether sect. 90 of the Act of 1903 entitles the defendant to variation in respect of the quarterly gale under the perpetuity grant of 21st March, 1872, which fell due on November 1st, 1903. No point was raised as to the gale being a quarterly, not a half-yearly gale. The argument advanced by defendant's counsel was directed to establish two propositions:—

(1.) The quarter's rent was not due until the expiration of the 1st November, and as the statute of 1903 commenced to operate by virtue of the Interpretation Act, 1889, sect 36, immediately on the expiration of October 31st, sect. 90 would apply to the gale as accruing due after October 31st.

(2.) The application of the Apportionment Act is excluded, as the word "gale" signifies the aggregate rent due as one integer, and the statute being remedial, the defendant is entitled to claim variation on the entire sum representing the gale. The plaintiffs' counsel contested both of these propositions, which I shall discuss separately.

1. Before deciding the first question, it is necessary to construe the Tithe Rentcharge Act, 1900, sect. 3, intended to be applied. It seems quite certain that the fifteen years' term from the 1st November, 1900, includes the 1st November; the gale accruing due after that date is the gale from November 1st to April 30th

(1) [1892] 3 Ch. at p. 421.

inclusive, payable on May 1st. The Tithe code demonstrates this. The standard of calculation is a period antecedent to the 1st November, and the new term of liability from the 1st November must include that day, as November 1st otherwise would be uncovered (see Goulburn's Act, 4 Geo. 4, c. 99, sects. 26, 31, 43; 5 Geo. 4, c. 63, sect. 25; Stanley's Act, 2 & 3 Wm. 4, c. 119, sects. 1, 6, 12 (where the word "after" is used), sect. 23; 1 & 2 Vict. c. 109, sect. 7).

Whether "from" is inclusive or exclusive depends on the purpose and context of the enactment or instrument. Where a calculation is intended to be in favour of a person, *prima facie* a construction favourable to him will be adopted: *Re North* (1); *R.* v. *Adderley* (2). In a letting (*Sidebotham* v. *Holland* (3)), or a contract of service (*Smith's Case* (4), *Wilkinson* v. *Gaston* (5)), inclusive computation is preferred. On the other hand, in case of a policy of insurance (*South Staffordshire Tramways Company (Limited)* (6)), or where a time within which an act is to be done is limited (*Goldsmiths' Company* v. *West Metropolitan Railway* (7)), "from" is reckoned exclusively. There is no general rule. The same flexible interpretation is applicable to the word "after" (see *R.* v. *Adderley* (2)), which may receive an inclusive effect.

The words "due" and "accrued due" must be interpreted in like manner according to the reason and context of the statute or document. "Due" may mean immediately payable (its common signification), or a debt contracted, but payable *in futuro*: *The Stockton Malleable Iron Company* (8); *Ex parte Kemp* (9); *Mitchell's Case* (10); *Tapp* v. *Jones* (11)). According to defendant, rent cannot be due without being payable, and it cannot be payable until the time of payment has elapsed and it is therefore in arrear. It is not, in my view, necessary to examine the old authorities following *Clun's Case* (12). In ordinary speech rent would be described as due on the gale day, though not then exigible, and in a sense it

(1) [1895] 2 Q. B. 264.
(2) 2 Doug. 463.
(3) [1895] 1 Q. B. 378.
(4) [1903] 1 K. B. 285; C. A. 438.
(5) 9 Q. B. 137.
(6) [1891] 1 Q. B. 402.
(7) [1904] 1 K. B. 1.
(8) 2 Ch. D. 101.
(9) L. R. 9 Ch. at p. 387.
(10) L. R. 5 Ch. at p. 403.
(11) L. R. 10 Q. B. 591.
(12) Tudor's R. P. Cases, 4th ed., 33.

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might be described as payable, though payment could not be enforced till the gale day had expired. What we have here to construe is the statute of 1900 in reference to tithe rentcharge, and it seems beyond question that the term commences on November 1st, 1900, and the first gale affected is that which falls due on May 1st, 1901, for the period from November 1st to April 30th inclusive.

If this be the effect of the Act of 1900, sect. 3, what does sect. 90 of the Act of 1903 mean when it directs that sect. 3 shall, as from the commencement of this Act (*i.e.* from the expiration of October 31st, 1903), apply in case of variable rents, and tithe rentcharge in the sections shall be deemed to include any variable rent?

Counsel on both sides agree that sect. 90 is not retrospective; it does not bring variable rents within the Act of 1900 as from the date when that statute began to operate in 1900. The nearest future date after the passing of the Act of 1903 to which the Act of 1900 could be applied in this case is November 1st, 1903, and I think this date must be adopted as the starting point, at least in the case of November gales, with which alone the present case is conversant. How gales payable on other gale days may be affected is not before us for decision. Though the 1st November, 1903, is the new point of departure, it by no means follows that it originates a new fifteen years' term—it may well be within the original term created by the Act of 1900.

If the 1st November, 1903, is substituted as the terminus in case of variable rents for the 1st November, 1900, the terminus in case of rentcharge, I think that the word "from" in the Act of 1903 must, just as in the Act of 1900, be understood inclusively. This construction, which is supported by 3 & 4 Wm. 4, c. 37, sect. 142 (which prescribes a standard next *preceding* the 1st May next before application), is certain from the incorporation of the Act of 1900, sect. 3. It is impossible that the meaning of "from," "accrued due," &c., in sect. 3, incorporated and applied by sect. 90, can be altered by the circumstances that it is rent and not tithe rentcharge that is dealt with in the Act of 1903. No assistance is derived from the curious learning in *Clun's Case* (1), as to

(1) Tudor's R. P. Cases, 4th ed., 33.

when rent is due, payable, or in arrear. This learning has little bearing on the construction of covenants or contracts to pay rent: *Haldane* v. *Johnson* (1). The meaning depends on the context: *Dibble* v. *Bowater* (2). Whatever sect. 3 in the Act of 1900 means, sect. 90 of the Act means also, making the necessary change of date, and substituting "rent" for "rentcharge."

The difficulty in the case is caused by section 90 introducing the sections of the statute of 1900 without any attempt at modification in order to suit the new conditions. The usual phraseology, "so far as may be," "*mutatis mutandis*," &c., is omitted. There is even no reference to the difference of gale days. My opinion on the first point is adverse to the defendant. The gale due on November 1st for the period from 1st August to 31st October inclusive was outside the benefit of the Act, which was not intended to apply retrospectively. Though the November gale could not be enforced legally till midnight on 1st November, it was due within the meaning of this legislation at the same moment that the Act of 1903 began to operate, and cannot be reckoned as included in the statutory term.

2. The second question argued for defendant was that if the gale accrued after the Act began to operate, the Apportionment Act did not apply, and the defendant would be entitled to vary the entire gale, notwithstanding that part of the rent accrued before the Act. Plaintiffs' counsel in reply relied on *Glass* v. *Patterson* (3), and insisted that there was nothing in the legislation to exclude the application of the Apportionment Act. That important authority no doubt decides that apportionment applies to liability as well as to benefit, and that it therefore affects contracts. If its reasoning applies to conveyances on sales or ordinary stock-exchange transfers, it may be that the established practice in such matters is wrong, and that a tenant who pays a grantee an entire gale, or a Company which pays a transferee an entire dividend, without apportionment, will be liable to be sued by the grantor or assignee for the apportioned part before grant or transfer, as the only form of instrument that I know of omits to make over the antecedent accruing rent or dividend

(1) 8 Exch. 689. (2) 2 E. & B. 564. (3) [1902] 2 I. R. 660.

K. B. Div. 1904. I. LAND COM. v. MASSEREENE. Gibson, J.

regarded as a distinct and severed debt. We are of course bound by *Glass* v. *Patterson* (1), if it applies. It is argued that it does not apply, at least if defendant's first proposition is right. The Act of 1903, section 90, was remedial, to remove the mischievous effects of a disastrous blunder. The ordinary meaning of gale is the entire periodic payment. The Act of 1900, referring as it does to gale, excludes any idea of apportionment: *Re Lucas* (2), a case on the construction of a will. Every gale accruing due *after* the commencement of the Act, to which the Act applies, it is said, is entitled to the benefit of the statutory variation, though the rent commenced to accrue before the Act. Assuming that defendant was right in his first proposition that the November gale was affected by the Act, and that it accrued due after the commencement of the Act, defendant's argument that he would be entitled to variation for the entire gale would be of considerable weight. My opinion, however, is that the first proposition fails. The November rent was due for the use of the land from August 1st to October 31st inclusive, and the benefit of the Act is given only in respect of subsequent rent accruing on and from November 1st.

The answer to the first question will be in the negative. The other questions are speculative, and the Court must leave them to be decided in some future case where they require decision.

KENNY, J.:—

Without at all suggesting that in some other given combination of circumstances there may not be difficulty of construction, it appears to me that on the facts of the present case no doubt can possibly exist as to the effect of the Acts of 1900 and 1903. The perpetuity grant of the 21st March, 1872, reserves the variable rent of £579 4*s.* 1*d.*, and makes it payable by four quarterly payments on the 1st February, 1st May, 1st August, and 1st November in each year. The present action is conversant with three gales of that rent, the last of which is that of the 1st November, 1903, and the right of the Land Commission to recover that gale in its entirety is disputed on the ground that the combined effect of

(1) [1902] 2 I. R. 660. (2) 54 L. T. (N. S.) 30.

the two statutes is to render the gale of rent in question liable to reduction. The argument in favour of this contention is so subtle that I confess to having great difficulty in appreciating it, having regard to the clear words of the 3rd section of the Act of 1900. That Act became applicable on the same day that the gale of rent in question became payable, namely, the 1st November, 1903, and the 3rd section is distinct in its language that it is to be referable to and to have the effect of varying "the sum payable in respect of every gale accruing due *after that date.*" To my mind it is absolutely clear that the 1st November, 1903, gale of rent did not accrue due *after* the 1st November, 1903. It accrued due on the very same date as that on which the Act came into force, and unless we are to give to the word "after" some meaning other than its ordinary grammatical one, I am quite at a loss to see how the section could be distorted so as to support the defendant's argument.

I agree in thinking that we can deal only with the first question put to us, and that we should answer it in the negative.

Wright, J., concurred.

Solicitor for the plaintiffs: *William Alexander.*
Solicitors for the defendant: *Richardson & Synnott.*

J. G. T.

K. B. Div. 1904. Feb. 1.

ENNISCORTHY URBAN DISTRICT COUNCIL, APPELLANTS; FIELD, RESPONDENT (1).

Local government—By-law—Reasonableness—Whirligigs and swings—Public Health Acts Amendment Act, 1890 (53 & 54 *Vict. c.* 59), *s.* 38.

An urban district council, purporting to act under the powers conferred by sect. 38 of the Public Health Acts Amendment Act, 1890, made a by-law, subsequently confirmed by the Local Government Board for Ireland, that no person should cause or suffer any whirligig or swing to be set in motion or driven on any land immediately adjoining or abutting upon any street or road within the district, unless such whirligig or swing was placed at a distance of not less than 20 yards from any road or street, and separated from any street or road by a wall not less than 14 inches in thickness, and carried up to a height of not less than 4 feet above the level of the street or road:—

Held, that the by-law was unreasonable and void, inasmuch as it required a structure of a permanent character, involving large expense, to provide against a temporary danger, which could as effectively be provided against by a temporary structure.

CASE STATED under 20 & 21 Vict. c. 43.

A by-law had been made by the Enniscorthy Urban District Council under section 38 of the Public Health Acts Amendment Act, 1890, and duly confirmed by the Local Government Board, to the following effect:—"No person shall cause or suffer any whirligig or swing to be set in motion or driven on any land immediately adjoining or abutting upon any street or road within the district, unless such whirligig or swing be placed at a distance of not less than 20 yards from any road or street, and be separated from any street or road by a wall not less than 14 inches in thickness, and carried up to a height of not less than 4 feet above the level of the street or road." "The district" was defined by the by-law to mean the urban district of Enniscorthy. The respondent was charged before the Justices of the Peace at Petty Sessions on a summons containing counts *inter alia* charging

(1) Before PALLES, C.B., and MADDEN and WRIGHT, JJ.

him with having, contrary to the by-law, caused or suffered certain whirligigs and swings driven by steam power, of which he was the proprietor, to be set in motion and driven on land immediately adjoining or abutting upon a street or road within the urban district of Enniscorthy at a distance of less than 20 yards from such road or street, and also with having caused or suffered such whirligigs to be set in motion and driven on land immediately adjoining or abutting upon a street or road within the said district, without the said land being separated from the said street or road by a wall not less than 14 inches in thickness, and carried to a height of not less than 4 feet above the level of said street or road. The majority of the Justices were of opinion that there had been in fact contraventions of the by-law as regards the matters charged in the above counts, but that the by-law was invalid as being unreasonable and *ultra vires*, and on this ground they dismissed the summons without prejudice as regards these counts.

On the application of the complainants, the Enniscorthy Urban District Council, the present case was stated, the question being whether the aforesaid determination of the majority of the Justices was correct in point of law.

Sealy (with him *W. G. Gibson*), for the appellants:—

The local authorities are the best judges of what is necessary to secure the public safety in cases of this kind. By-laws made by them are to be interpreted benevolently, and the Courts are slow to hold them void for unreasonableness: *Kruse* v. *Johnson* (1); *Slattery* v. *Naylor* (2). The by-law here is not unreasonable: *Gentel* v. *Rapps* (3); *Mayor of Southend-on-Sea* v. *Davis* (4); *Salt* v. *Scott Hall* (5); *Teale* v. *Harris* (6).

Henry, K.C., and *James O'Connor*, for the respondent:—

The by-law is unreasonable. It is in effect practically a prohibition of these whirligigs. The only possible dangers which can

(1) [1898] 2 Q. B. 91.
(2) 13 A. C. 446.
(3) [1902] 1 K. B. 160.
(4) 16 *Times* L. R. 167.
(5) [1903] 2 K. B. 245.
(6) 60 J. P. 744.

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be suggested are the public crowding in, animals getting in, or horses being frightened. It is absurd to say that a wall 14 inches thick is necessary to provide against these dangers; they could be equally well provided against by a wooden hoarding, which could be erected at comparatively trifling expense. Moreover, a wall 4 feet high would be of no effect to provide against the frightening of horses. The by-law is too wide: *Strickland* v. *Hayes* (1). The expression "land immediately adjoining or abutting upon any street or road" in the by-law cannot be restricted to mean the piece of land on which the whirligig stands, since the whirligig must be not less than 20 yards from the road. The by-law therefore would apply to the case of a whirligig erected in a large field adjoining the road, although the whirligig itself might be at the other end of the field half a mile or more from the road: *The Oxford* (*Limited*) v. *London County Council* (2); *R.* v. *Hodges* (3). Moreover, the by-law would apply to a site outside the district altogether if it formed portion of lands abutting on a road in the district. In *Kruse* v. *Johnson* (4) there was a limit of 50 yards from a dwelling-house. In the *Mayor of Southend-on-Sea* v. *Davis* (5) the by-law followed the terms of the statute. [They referred to *Dublin Corporation* v. *Toft* (6)—a decision of the Recorder of Dublin.]

W. G. Gibson, in reply:—

The interpretation clause in the by-laws shows that land manifestly means land within the district. [He referred to *Baroness Bateman and Parker's Contract* (7); *Pomeroy* v. *Malvern Urban District Council* (8); *Simmons* v. *Malling Rural Council* (9).]

PALLES, C.B.:—

We have considered this case with a good deal of care. It seems to us to involve considerable difficulty, and to be very near the line. We all acknowledge the right of representative bodies,

(1) [1896] 1 Q. B. 290.
(2) [1898] 2 Ch. 491.
(3) Moo. & Mal. 341.
(4) [1898] 2 Q. B. 91.
(5) 16 *Times* L. R. 167.
(6) Unreported.
(7) [1899] 1 Ch. 599.
(8) 19 *Times* L. R. 597.
(9) [1897] 2 Q. B. 433.

such as the appellants here, to be largely judges of what is necessary in their own localities, and we abide fully by the judgment of Lord Russell, C.J., in *Kruse* v. *Johnson* (1), which, ever since it has been pronounced, has been regarded as the leading authority on the subject. Further, I am quite prepared, in a case in which it shall be necessary to do so, to act on the principle laid down by Wright, J., in *Simmons* v. *Malling Rural Council* (2), as to fixing an arbitrary limit. He says there:—"It was said that it was unreasonable because it fixed an arbitrary limit of fifty feet, and it was pointed out that it would have a hard effect in many cases, where that distance could not be obtained. It is obvious, however, that there must be some limit in the interest of public convenience and of certainty, and almost any limit might lead to hard consequences in particular cases. The discretion must rest with the sanitary authority to say what is a reasonable distance in the particular locality." That is sound sense, as well as good law, and I should be slow to interfere with these by-laws merely by reason of the thickness of the wall being required to be 14 inches, although I myself would be inclined to think that a wall of very much less thickness would be sufficient. But I am of opinion that this by-law is unreasonable, even though we apply to it fully the principles laid down in the two cases I have mentioned, and on this ground. We know that the use of land for this particular purpose is always, or at least usually, temporary. What is contemplated is not the permanent establishment of these whirligigs and swings in a particular place, but their coming there for a short space of time, and the object of the by-law is to prevent danger during the time the land is occupied for such purpose. In my opinion the vice of this by-law is that while the danger to be provided against is of a temporary nature, which could as well be provided against by a structure of a temporary, and, therefore, comparatively cheap, character, the by-law requires a structure of a permanent nature involving large expense. If the by-law had been that there should have been a hoarding 8 or 9 feet high, that could be put up temporarily and at small expense, it would have been much more effective, because it would have guarded not

(1) [1898] 2 Q. B. 91. (2) [1897] 2 Q. B. 433, at p. 438.

K. B. Div. 1904. ENNISCORTHY U. D. C. *v.* FIELD. Palles, C.B.

merely against the dangers provided against by the present by-law, but also against the danger of horses when passing along the road seeing these machines in operation.

The ground of my judgment is that the danger to be guarded against here is in its nature temporary, while the provision made for it is absolutely permanent, with the result of throwing a large and unnecessary expense upon persons trying to carry on a business of this description. On these grounds I think that the decision of the magistrates ought to be affirmed. No costs.

MADDEN and WRIGHT, JJ., concurred.

Solicitor for the appellants: *John A. Sinnott.*
Solicitor for the respondent: *T. B. Moffatt.*

J. G. T.

K. B. Div. 1903. Nov. 12, 23.

JAMES SMITH *v.* ARTHUR SMITH (1).

Practice—County Court—Civil bill appeal—Decree—Action for amount of former decree—Adjournment of hearing—Lapse of seven years from decree—Extinguishment of debt—14 & 15 *Vict. c.* 57, *s.* 144.

The plaintiff obtained a civil bill decree against the defendant on 13th April, 1896, no renewal of which was at any time applied for or granted. On 2nd January, 1903, the plaintiff issued a new civil bill to recover the amount due under the former one, which came on for hearing at Sessions held on 31st March, 1903, but stood adjourned to the ensuing Sessions, when the plaintiff obtained a decree for the amount sued for, dated 18th June, 1903.

On a case stated by the Judge of Assize on appeal:—

Held (Wright, J., dissenting), that the decree appealed from not having been made before the expiration of seven years from the date of the original decree, the debt and costs under the latter were, by virtue of section 144 of 14 & 15 Vict. c. 57, absolutely extinguished, and that the action was not maintainable.

O'Prey v. *M'Kibben* (34 I. L. T. R. 162) considered.

CASE STATED.

This was a case stated by Mr. Justice Gibson at the County

(1) Before KENNY, BARTON, and WRIGHT, JJ.

Fermanagh Summer Assizes, 1903, for the opinion of this Division, as follows:—

1. This was an appeal from a decree dated 18th June, 1903.

2. The plaintiff had obtained a civil bill decree against the defendant for £7 6s. at Newtownbutler Quarter Sessions, county Fermanagh, on 13th April, 1896. The said decree and the present civil bill and decree thereon are to be deemed part of this case.

3. No renewal of this decree was at any time applied for or granted, or payment made on foot of the said decree.

4. The plaintiff on 2nd January, 1903, issued a civil bill to recover the said sum of £7 6s.; the cause of action was stated as "Being the amount of a civil bill decree bearing date 13th April, 1896, pronounced by the County Court Judge of Fermanagh in an action wherein the plaintiff was plaintiff, and the defendant was defendant." The decree appealed from was made on the said civil bill. The defendant's counsel contended that the remedy was barred.

5. The question for the opinion of the Court is whether the action is maintainable; if so, the decree pronounced by the County Court Judge is to be affirmed with costs; if the Court is of opinion that the action is not maintainable, the decree is to be reversed, and the action dismissed with costs.

P. Law Smith, for the defendant:—

The plaintiff had obtained his original decree on the 13th April, 1896. No renewal of this decree was ever applied for or granted, and when the new decree of the 18th June, 1903, was obtained its effect was to give a new lease of life to a debt and costs which, under the 144th section of 14 & 15 Vict. c. 57, had become absolutely extinguished and incapable of being enforced "by any proceeding whatsoever." This section contains an absolute prohibition against any enforcement of the original decree in the case. *O'Prey* v. *M'Kibben* (1) only decided that a civil bill process

(1) 34 I. L. T. R. 162.

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can be brought on foot of a County Court decree after six years, and before the expiration of the seventh. This was a circuit decision, and, it is submitted, wrongly decided. The Chief Baron appears to have thought that he was bound by *Moffatt* v. *Burrowes* (1): there the action was brought in the Superior Court to recover the balance due on foot of a civil bill decree within six years from the date of the decree, and the present point did not arise for consideration.

It is submitted that the judgment of Webb, C.C.J., in *Gourley* v. *Roulston* (2), refusing to follow *O'Prey* v. *M'Kibben* (3), is correct. It was reversed by Holmes, L.J. (who offered to state a case), for the sake of uniformity with the decision of the Chief Baron in *O'Prey* v. *M'Kibben* (3). Even if the decree under appeal had been made in fact before the expiration of the seventh year, it could only remain in force until the expiration of the seventh year, having regard to the 144th section.

T. J. Smyth, for the plaintiff:—

This was an action on a decree made by a Court of competent jurisdiction, which implies a debt, and such decree can be enforced by an action of debt upon the judgment: Leake on Contracts, p. 80; *Hodsoll* v. *Baxter* (4). The question of renewal does not affect this case. The suit was commenced before the expiration of the seventh year from the date of the original decree, and *Teas* v. *Hyndman* (5) decided that the service of the process, and not the hearing of the cause, is the commencement of the suit. The fact of the adjournment could have been stated on the face of the decree: *Myhane* v. *Hurley* (6).

[The following cases were also referred to:—*Hebblethwaite* v. *Peever* (7); *Jay* v. *Johnstone* (8); *O'Reilly* v. *Carroll* (9).]

Cur. adv. vult.

(1) 4 I. C. L. R. 297.
(2) 35 I. L. T. R. 148.
(3) 34 I. L. T. R. 162.
(4) E. B. & E. 884.
(5) 3 Cr. & D. C. C. 202.
(6) 26 I. L. T. R. 80.
(7) [1892] 1 Q. B. 124.
(8) [1893] 1 Q. B. 25.
(9) 3 Cr. & D. C. C. 348.

KENNY, J.:—

This comes before us on a case stated by Gibson, J., at the last Fermanagh Assizes. The short facts are these. The plaintiff on the 13th April, 1896, at Newtownbutler Civil Bill Sessions obtained a decree against the defendant for the sum of £7 6s. No payment was ever made on foot of that decree, nor was it ever renewed. On the 2nd January, 1903, more than six years from the date of the decree, the plaintiff issued a civil bill process on foot of it for the next Sessions—presumably those held at Newtownbutler on 31st March, 1903. It is admitted by the defendant that the case did come on at those Sessions, that is, at a Sessions between the close of the sixth and seventh year from the date of the original decree, and for some reason with which we are unacquainted stood adjourned to the June, 1903, Sessions, when on the 18th of that month the decree under appeal was made.

The question reserved for this Court by the learned Judge is whether the action was maintainable, and its determination mainly turns on the interpretation to be placed on the 144th section of the Civil Bill Act (14 & 15 Vict. c. 57). [His Lordship read the section, and continued.]

The other sections of the Civil Bill Act touching the point under discussion are the 139th, which declares that a decree is to be in force for one year from its date, and may be renewed once in every six months; the 140th, which enables a decree to be renewed on affidavit; and the 142nd, which prohibits a renewal unless on notice when two years shall have elapsed from the date of the original decree. The form of a renewal will be found at p. 1233 of Carleton's County Courts Practice. Order XXII., Rule 3, of the County Court Rules provides that where a decree can be renewed by affidavit only or on notice, no civil bill process shall be brought on same.

In the argument before us no question has been raised as to the right of a plaintiff in a civil bill decree to bring an action on that decree in the Civil Bill Court, just as an action in the Superior Courts might be maintained on a judgment. Indeed the County Court Rule to which I have referred contemplates such an action.

What was contended for by the defendant was, (1) that if the decree appealed from had been made at a Sessions held before

K. B. Div. 1903. SMITH v. SMITH. Kenny, J.

the expiration of the seven years mentioned in the 144th section, such a decree would remain in force only up to the expiration of the seven years; and (2) that the decree under appeal having been made after the expiration of the seven years, the debt must be deemed to have been then extinguished and the action unmaintainable.

As to the first point, we think there is nothing in it, notwithstanding the remarks reported to have been made by Judge Webb in *Gourley* v. *Roulston* (1). That case had been preceded by *O'Prey* v. *M'Kibben* (2), which was a civil bill appeal disposed of by the Chief Baron at Downpatrick Assizes, in which he affirmed the right of a plaintiff in a civil bill decree to bring an action in the Civil Bill Court on foot of it, and to thereby create a new starting-point for all purposes by the decree to be obtained in such a proceeding. That is a circuit decision in a civil bill appeal, and is not binding on this Court, but I see no reason to doubt its correctness. In that case the original decree was dated the 31st May, 1894. It was never renewed. The civil bill process on foot of it was issued and served in May, 1900, and the decree—which the Chief Baron affirmed—was given at June, 1900, Sessions. In my opinion the order of the Chief Baron was absolutely right, and so was the observation he is reported to have made—that "the logical effect is that this decree can be renewed and kept good for another six years." In other words, it has all the characteristics of an original decree, and subject to like consequences as to renewal and extinguishment of the debt. In *Gourley* v. *Roulston* (1) Judge Webb took a view opposite to that of the Chief Baron, but it is one in which I cannot concur. The learned County Court Judge was, in my opinion, wrong in thinking that as a result of the Chief Baron's view greater effect would be given to such a decree than would be given to a judgment in the Superior Courts: see *Watters* v. *Lidwell* (3). The other point is a more difficult one, and there is no authority on it. Starting with what I have already stated, that an action may be brought on a decree towards the end of the sixth year—or at any time in the seventh year of its existence—and a decree obtained

(1) 35 I. L. T. R. 148. (2) 34 I. L. T. R. 162. (3) 9 I. L. R. 362.

within the seven years—can the present decree, which was obtained at a date outside the seventh year, be maintained? If the process was issued and served for a Sessions beyond the seven years, I am of opinion that the 144th section would be an absolute bar to the plaintiff, inasmuch as the debt would, at the date of the hearing of the civil bill, have been absolutely extinguished. That section has taken the place of the 27th section of the 36 Geo. 3, c. 25, which provided that no decree should be renewed "after six years from the time of the making or pronouncing the same, but such debt and costs shall after six years from the making of the original decree . . . *and the expiration of the last renewal* . . . be presumed to have been levied or paid." The language of this section gave rise to considerable controversy—a reference to which will be found in Copinger's County Court Practice, p. 185. Amongst the authorities there mentioned is *Teas* v. *Hyndman* (1), which was also cited to us in argument. In that case the original decree was dated 18th October, 1837, and an action was brought on it by civil bill, the latter being served on 22nd September, 1843, for a Sessions commencing 9th October. The process was not heard until the 20th October, two days beyond the six years. On the appeal before Crampton, J., it was contended that on the 20th October the debt should be presumed to have been levied or paid, and that a decree could not then be given; but the learned Judge is reported to have held that the section applied only in cases of applications for renewal, and could not be relied on when an action was brought on the decree.

The 144th section, which we have to deal with, is widely different in its language from that which was the subject of argument in *Teas* v. *Hyndman* (1). It contemplates more than a mere presumption of payment or levy. The debt at the end of seven years is to be extinguished for all purposes, and is not to be enforced by any proceeding whatever. Up to the end of the seven years the debt is a good one, capable of being sued on, and of supporting a decree, if the latter be made before the expiration of the seven years. But in my opinion the decree must be made before the expiration of the seven years. Otherwise the

(1) 3 Cr. & D. C. C. 202.

K. B. Div. 1903.

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Kenny, J.

County Court Judge finds himself in the position of adjudicating on a non-existent subject-matter. We must be guided by the date of the decree, and if we find that at that date the original debt was gone, I cannot see how the decree can be maintained. We are dealing with a very special section, which does not, like other statutes of limitation, speak of "commencing an action" within seven years, but absolutely extinguishes the debt for all purposes. A somewhat curious circuit case of *Myhane* v. *Hurley* (1) has been relied on for the proposition that because the process was brought before the expiration of the seven years, and —I am willing to assume—for a Sessions also within that period, the decree in such a case could be supported. In *Myhane* v. *Hurley* (1) the civil bill was one for a renewal of a decree dated 7th July, 1885, and was served on 10th June, 1891, for a Sessions on 7th July, 1891—exactly six years' interval. The case had not been reached in July, and was adjourned to October—when the renewal was granted. On appeal before Fitz Gibbon, L.J., he is reported to have asked: "What jurisdiction was there to make this order of renewal? The words of section 142 are 'renew,' that is, 'grant a renewal,' not 'make an application to renew.'" To this question he apparently got no reply—but the reporter adds that he eventually affirmed the decree. On what grounds he did so I am quite unable to say, as the report does not supply them.

I am therefore of opinion that the question put to us in the case should be answered in the negative.

BARTON, J., concurred.

WRIGHT, J.:—

If the decree had been made within the seven years it would have been good, but the difficulty arises from the dates in the case. The civil bill was issued for a Sessions within seven years from the date of the original decree, but owing to various adjournments the decree itself was dated more than seven years from the date of the original decree. [His Lordship read the facts and judgment

(1) 26 Ir. L. T. R. 80.

in *Teas* v. *Hyndman* (1).] The question therefore arises whether commencing proceedings for renewal by issuing a summons within the time is enough. In *Myhane* v. *Hurley* (2) Lord Justice Fitz-Gibbon held that it was sufficient if notice to renew was served for a Sessions within the six years, even though in consequence of adjournments the decree was not actually made until after six years. In the present case the plaintiff commenced within the time mentioned in the section. The County Court Judge had then power to make the decree, and the action of the Court in adjourning the case from Sessions to Sessions cannot take away the rights which the plaintiff admittedly had in January, 1903. Therefore I am of opinion that the plaintiff's action is maintainable.

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SMITH *v.* SMITH.

Wright, J.

Solicitor for the plaintiff: *H. Murphy.*
Solicitor for the defendant: *M. E. Knight.*

R. ST. J. C.

HASTINGS *v.* COGAVIN (3).

K. B. Div. 1904.

Feb. 12.

Local Government Act, 1898 (61 & 62 *Vict. c.* 37)—*Orders, December*, 1898, *art.* 12—*Contract in respect of public work in the district—Supply of goods to lunatic asylum—Asylum board representing two counties—Urban district councillor in one a contractor—Penalty.*

Article 12 of the Orders of the 22nd December, 1898, made under the Local Government (Ireland) Act, 1898, provides that "A person shall be disqualified for . . . being a member of a council . . . of a district . . . if he is concerned . . . in any bargain, or contract, entered into with the council" (*i.e.* county or district), ". . . and for the purpose of this provision any bargain or contract with the county council in respect of any *public work in a district* shall be deemed to be a bargain, or contract, with the council of that district."

The respondent was an acting councillor for the urban district of Ballinasloe, county Galway, and while such acting councillor was a contractor to the board of governors of the Ballinasloe Lunatic Asylum for the supply of delft

(1) 3 Cr. & D. C. C. 202. (2) 26 Ir. L. T. R. 80.
(3) Before LORD O'BRIEN, L.C.J., and GIBSON and WRIGHT, JJ.

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and brushes. The district of the asylum comprised two counties, Galway and Roscommon, and the board was a joint committee of the councils of both counties, with a representation from each council, pursuant to section 9 of the Act:—

Held, that the respondent's contract was not one in respect of any public work within the district, and that therefore he had not incurred a penalty under article 12.

Held, also, by Gibson, J., that the contract was not within the mischief (viz. a conflict of interest and duty) prohibited.

CASE STATED by the magistrates for the Petty Sessions District of Ballinasloe.

At Petty Sessions held on the 12th December, 1903, the defendant John Cogavin was charged on the complaint of William Hastings with having, on the 16th and 23rd days of November, 1903, acted in his capacity as an urban councilllor, he being then and previously disqualified for acting as an urban councillor by reason of being a contractor to the county council of Galway, or a committee of same. At the hearing of the complaint, it was proved on the part of the complainant, and admitted by the defendant, that the defendant was on the days specified a contractor to the board of governors of the Ballinasloe Lunatic Asylum for the supply of brushes and delft to the asylum. The district of the Ballinasloe Lunatic Asylum comprised two counties, viz. the counties of Galway and Roscommon, and the committee or board of governors of the asylum was a joint committee of the councils of the two counties, with a representation of each council, in accordance with the provisions of section 9 of the Local Government (Ireland) Act, 1898. The defendant was a councillor of the urban district of Ballinasloe, in the county of Galway, within which district the asylum was situated. At the hearing it was contended on the part of the defendant that, inasmuch as he was not a contractor to the urban council nor concerned in any bargain or contract for the maintenance or repair of any public work with the county council, the Local Government (Ireland) Act did not affect him, so far as the complaint in the summons was concerned. The magistrates accordingly dismissed the case without prejudice, holding against the complainant on the point of law involved, viz. that the defendant by being a con-

tractor to the asylum board was not disqualified for acting as an urban councillor. The question for the determination of the Court was whether the magistrates were right in so holding.

Bartley, for the complainant:—

By article 12 of the Orders of the 22nd December, 1898, a person is disqualified who is concerned in any bargain or contract entered into with the district council, or participates in the profit of any such bargain or contract, or of any work done under the authority of the council; and any such bargain or contract with the county council in respect of a public work in the district is deemed to be a bargain or contract with the council of that district. Sub-article 6 extends the disqualification to cases where the bargain or contract was entered into with a committee appointed by the county council, or a joint committee partly appointed by the county council. The board of governors of the Ballinasloe Asylum, which is the asylum for the counties of Galway and Roscommon, is a joint committee of the county councils of Galway and Roscommon (Local Government Act, 1898, sect. 9 (7)). My first proposition is that brushes and delft are a "public work" within the meaning of the section, and my second, that the act of supplying of brushes and delft to the lunatic asylum is a "public work" in the district. The expression "public work," as defined by the Local Government Act, section 109, means "any road or work in respect of which, under the Grand Juries Acts, a presentment might, but for this Act, be made by any Presentment Sessions for a barony or county at large, or any Grand Jury." The support, supply, and maintenance of a lunatic asylum in the district of a Grand Jury is a work the expense of which under the Grand Jury Act was raisable by the Grand Jury (6 & 7 Wm. 4, c. 116, s. 92). By sect. 12 the "maintaining of any dispensary" was classed with the lowering of any hill or filling in of any hollow in any public road, and other matters, admittedly "public works," the expenses whereof whereof were raisable by presentment. The true construction of that section is that anything paid for by presentment comes within the definition of "public work."

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[He referred to *Nutton* v. *Wilson* (1), *Nell* v. *Longbottom* (2), and *Barnacle* v. *Clark* (3).]

Powell, for the defendant:—

This Court will not derive any assistance from the decided cases, all of which contain the element of conflict between interest and duty on the part of the members of the particular public body. No such conflict arises here. The asylum is one for the counties of Galway and Roscommon; and its geographical situation in the district of Ballinasloe has nothing to do with the district council of Ballinasloe, of which the defendant is a member. The expression "work" in the definition section (Local Government Act, section 109) is to be read as *ejusdem generis* with the word "road." See judgment of Sir Arthur Hobhouse in *Blackwood* v. *The Queen* (4). The bargain or contract with the county council in respect of a public work in the district (referred to in article 12) must mean a public work in which the district council is interested. [He also referred to *Maguire and Gatchell* v. *County Council of Fermanagh* (5).]

LORD O'BRIEN, L.C.J.:—

It appears that John Cogavin was summoned by William Hastings for acting as a district councillor when he was disqualified for so acting. The facts are these—Mr. Cogavin was an urban district councillor of the urban district council of Ballinasloe, and he entered into a contract with the committee of the Ballinasloe Lunatic Asylum (jointly appointed by the county councils of Galway and Roscommon) for the supply of brushes and delft to the lunatic asylum, which is situated in the Ballinasloe urban district, and notwithstanding this contract, he continued to act as councillor of the urban district council. It is alleged that, under these circumstances, he acted as a district councillor when he was disqualified for so acting, having regard to the provisions of article 12 of the Orders of the 22nd December, 1898. The particular clause of the Order relied upon is as follows:—"A per-

(1) 22 Q. B. D. 744.
(2) [1894] 1 Q. B. 767.
(3) [1900] 1 Q. B. 279.
(4) 8 A. C. 82.
(5) 2 New Ir. Jur. 67.

son shall be disqualified for being elected, or chosen, or being a member of a council of a county, or of a district, or of a board of guardians, or of any town commissioners, if he . . . is concerned by himself, or his partner, in any bargain, or contract, entered into with the council, board, or commissioners, or participates by himself, or his partner, in the profit of any such bargain, or contract, or of any work done under the authority of the council, or board, or commissioners; and for the purpose of this provision any bargain, or contract, with the county council in respect of any public work in the district shall be deemed to be a bargain, or contract, with the council of that district."

Now, he did enter into a bargain with the county council with reference to the asylum, and it is suggested that under this article he must be deemed, as a member of the district council, to have entered into a contract in respect of a "public work." The article is peculiar, but I think it is plain enough. Let me go back to the material words:—"For the purpose of this provision, any bargain or contract with the county council in respect of any public work in the district shall be deemed to be a bargain or contract with the council of that district." Was the contract to supply brushes and delft to the county council, or its committee, a bargain or contract in respect of any "public work" in the district? On the moment, one would say that it was not. I will assume, for the purpose of my judgment, that the asylum itself was a public work. But was the supplying of brushes and delft a contract "in respect of a public work"?

It was argued first by Mr. Bartley that brushes and delft were public works within the meaning of the section—a far-fetched suggestion indeed, bordering upon the grotesque. The second argument put forward by Mr. Bartley was that, if the brushes and delft in themselves were not public works, the supplying of brushes and delft to the asylum was a public work. I think that proposition equally unsustainable with the first.

I suggested during the argument that the words "in respect of any public work" might embrace a contract in any way relating to a public work, and assuming the asylum to be a public work, a contract to supply it with brushes and delft was a contract relating to a public work, the public work being the asylum.

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However, on consideration, I do not think that is a true view of the case. I am not justified in not giving to these words "in respect of a public work" their ordinary grammatical signification, and I think they mean in respect of the fabric of a public work, and the maintenance and repair of it.

Therefore I think that the view taken by the magistrates was right.

It was argued by Mr. Powell that this case was not within the section, because it was not within the mischief of the section. He said that his client was not amenable under the section, as he had no duty as urban councillor with reference to this asylum. I do not say that that is not an arguable view, but it is not the view upon which I decide this case; my difficulty as regards Mr. Powell's contention is that to accept it would be to introduce words into the section which are not there.

I found my judgment on the words "in respect of a public work," and I hold that they mean a contract in respect of the fabric of the work, its maintenance or repair.

Upon these grounds we decide with Mr. Powell, and the complainant must pay the costs.

GIBSON, J.:—

The question raised in this case is whether the defendant, a member of the urban district council of Ballinasloe, who was a contractor with the Ballinasloe Asylum in the district for the supply of brushes and delft to the institution, has a contract with the county council "in respect of any public work in a district," within article 12, sub-sect. 4 (*e*), of the Privy Council Order, 22nd December, 1898. The asylum is for the counties of Galway and Roscommon, and the joint committee, under sect. 9 of the Act of 1898, represent (it is said) their respective county councils, under sect. 6 of article 12.

The prosecutor's argument is based on the definition of "public works" in sect. 109 of the statute of 1898, and he contends—(1) that everything in respect of which a Grand Jury presentment could have been made is a public work, and that accordingly the brushes and delft could be so described; (2) that the asylum was a public work, and that the goods supplied to the

asylum were "in respect" of such work, the enactment relating to the establishment as a going concern, and not merely to the fabric and its maintenance.

The expression occurs in several places in the Grand Jury Acts, *e.g.* 6 & 7 Wm. 4, c. 116, s. 69; 16 & 17 Vict. c. 136, s. 1, and 35 & 36 Vict. c. 42. It is found in many contexts in the Act of 1898, *e.g.* sect. 11, sub-sect. 1; sect. 27, sub-sect. 1 (*b*); sect. 71, sub-sect. 2 (road or public work); sect. 82, sub-sects. 2, 4.

However wide an interpretation be given to the expression, it cannot, on the obvious construction of article 12, sect. 4 (*e*), embrace the mere supply of movable chattels, like brushes or food, which could not be properly described as public works "in a district." The first argument may therefore be dismissed.

As to the second point: the defendant contends that what the enactment was directed against was to prevent the conflict of interest and duty where the action of the county council is to proceed on proposals by the district council, under the Procedure of Councils Order, 1899 (Vanston, p. 284). Though the article contains no express limitation, the public work must be "in the district," and the contract must be "in respect of" such work.

The asylum here is for Roscommon as well as Galway. The prohibition cannot relate to the urban councillors of Roscommon, as the asylum is not situate in that county. The provision is penal, and cannot be strained beyond the obvious and natural meaning of its language and the mischief with which it was intended to deal. A contract for the supply of goods to the asylum committee is not a contract "in respect of any public work in a district." These words point to something like maintenance of structure, &c., and there is no reason of policy or principle for giving them such a wide interpretation as the prosecutor puts forward. Whether a contract in respect of a public work in an urban district as to which there could be no conflict of interest, *e.g.* a county courthouse, would be within the provision, is a matter I abstain from expressing an opinion on. The words are wide.

WRIGHT, J., concurred.

Solicitor for the complainant: *R. Robinson Black.*

Solicitor for the defendant *H. Davidson.* J. L.

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1903
June 18, 19, 20, 24.
—
Appeal.
1904.
Jan. 12–14.

HEWSON *v.* CLEEVE (1).

(1903. No. 860.)

Practice—Particulars—Pleading—Libel—Justification—Evidence—Order XIX., Rules 4 and 6.

The defendants published a libel on the plaintiffs, and, on an action for damages being brought, pleaded fair comment and justification. The libel charged the plaintiffs with swindling, obtaining goods from traders on credit and not paying for them, in the city of L. It was pleaded generally, without an innuendo. The plea of fair comment mentioned some matters in the nature of particulars, all confined to the city of L.; but no particulars were given by the defendants or required by the plaintiffs, in respect of the plea of justification. At the trial the plaintiffs, in cross-examination, admitted that they left L. secretly; that they left blinds and curtains up in their house when quitting; that they owed rent and bills to traders in L., and they also admitted having left bills and rent due by them in the city of C., where they had resided before they came to L. Evidence from witnesses in C. was then produced to show that they had previously pursued a course of dealing in C. similar to what was alleged by the libel against them in L. Notwithstanding objection, the Judge at the trial admitted this evidence, the objection not being grounded on surprise, but on the inadmissibility of evidence which had not been mentioned in the libel or in the plea of fair comment. The jury found for the defendants, and on a new trial motion:—

Held (by the Court of Appeal, reversing the decision of the King's Bench Division), that the evidence was admissible, notwithstanding that no particulars had been given, the plaintiffs having waived their right to obtain particulars.

NEW TRIAL MOTION.

The action was one of libel. The statement of claim was as follows:—

1. The plaintiffs, J. R. Hewson (gentleman) and his wife Georgina Hewson, reside in 38, Lower Baggot-street, Dublin.

2. The defendants are the proprietors and publishers of a

(1) In the King's Bench Division, before PALLES, C.B., and JOHNSON, BARTON, and WRIGHT, JJ.

newspaper called the *Limerick Chronicle*, published by them at their registered office, No. 59, George-street, Limerick.

3. At the time of the grievances hereinafter mentioned the plaintiffs had just left Limerick for Dublin.

4. The defendants in the said *Limerick Chronicle* of the 6th November, 1900, falsely and maliciously wrote and published of and concerning the plaintiffs the words following, that is to say :—

"SWINDLERS IN LIMERICK.—TRADERS VICTIMISED.

"A pair of swindlers" [meaning thereby the plaintiffs] "who have recently departed from Limerick to seek fresh woods and pastures new, in which to carry on their swindling, have left behind them some unpleasant reminders of their stay in the Ancient City in the shape of unpaid bills. Several of the local tradesmen are left lamenting, and if in future they should, as a result of the betrayal of their confidence, decline to put faith in a pleasing appearance, honeyed words, and apparently sincere promises, nobody could blame them. For a certainty several of the traders of the city have a balance in their ledgers they are not likely to see. The pair in question occupied a fairly large house Military Road way. It was well furnished, though at whose cost we cannot say. By dint of suave manners, good appearance, ability to talk, and make the most of a remittance which was always coming at the end of a quarter, and especially by at first paying cash, they obtained practically unlimited credit. They were enabled to live on the fat of the land by the simple expedient, as it now turns out, of transferring their custom to another house when a tradesman became too pressing. Their landlord, who, by reason of their plausible stories, agreed to forego the security for rent, was from time to time so put off that, now that the birds are flown, leaving the cage empty, he finds himself minus the rent for about four months, his only realisable seizure for the money being the dainty curtains left in the windows as a blind to passers by. Almost all the necessaries of life, apparently, have been ordered for some time, and no payment made; and neither the gentleman nor his lady disdained a slight loan occasionally, when the remittance had not arrived: although one tradesman, who was mulcted in other ways as well, was sweetly told by the lady that she could not sleep at night till she had repaid him a small amount he had lent her. She never did pay, and the tradesman has now the satisfaction of knowing that it was his money that paid for an outing at Kilkee, and the cost of the refreshment the pair took with them. Their departure was cleverly and carefully managed. When it was made, or how, not even the neighbours know. Whether the furniture was first sold

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or taken away is not known either. To disarm suspicion they gave it out that they were going for a holiday, and that tradesmen need not call for a month. On the expiration of that time the house was found empty, with the exception of the curtains at the windows, already mentioned. Needless to say, the victimised ones are on the track, and as it is believed the couple have gone back to Cork, where the same plausible game may be again played, there is a strong determination to lay them by the heels, not merely for the debts incurred, but for obtaining goods by false pretences."

5. In consequence of the premises the plaintiffs have been and are greatly injured in their credit and reputation, and the plaintiffs claim £1000 damages against the defendants in respect thereof.

The defendants pleaded the usual traverses, and also pleas of fair comment and justification, which were as follows:—

(*a*) The defendants say that the alleged libel complained of in the statement of claim was a fair comment made upon facts of public interest in the city of Limerick, and made *bona fide* and without malice, and believing said comment to be true and accurate, as the circumstances under which the same was published were as follows:—The defendants were entirely ignorant of the existence of the plaintiffs down to the month of August, 1901, but in or about the early part of the year 1900 there was living in Limerick a person calling herself "Madame Norma," who professed to tell fortunes, and practised palmistry and clairvoyance, and obtained money from divers people by the aforesaid practices; and there was also a man whom the defendants now believe to be the plaintiff, James Robert Hewson, residing in the house with the said "Madame Norma," and reputed to be her husband: this man was known to the Limerick public as "the Captain." The said "Madame Norma" and her husband left Limerick suddenly in or about the month of October, 1900. Both these persons obtained credit in Limerick by means of their pleasing appearance and suave manners and ability in conversation, and frequent allegations of large sums of money that were to come to them at the end of each quarter, and when these persons failed to obtain further credit they transferred their custom to other shopkeepers in the city. In October, 1900, when leaving suddenly as aforesaid these persons left owing considerable sums of money

to divers parties without leaving any address, and to avoid further publicity. The defendants say that the alleged libel was a fair comment on matters of public interest, and made *bona fide* and without malice, and believing the same to be true.

(*b*) The defendants say that the statements in the alleged libel are true in substance and in fact.

No particulars of this plea of justification were given by the defendants or asked for by the plaintiffs.

In an affidavit made on behalf of the defendants for the purposes of a venue motion it was stated that all their witnesses resided in or near Limerick.

The action was tried before Mr. Justice Kenny, and a special jury of the city of Limerick, at the Spring Assizes, 1903.

In cross-examination the plaintiffs admitted that the female plaintiff was by profession a palmist known as Madame Norma; that she called herself The Honourable Georgina Hewson in private life; that the plaintiffs had taken a good house on coming to Limerick; that they had left without paying the rent due; that they left by the last train at night; that before going they sold their furniture to a dealer, who removed it from the house by night on two occasions; that they left the blinds up in the windows when leaving; that they owed several bills in Limerick, which they had not yet paid; that when leaving they gave their addresses, the General Post Office, Dublin. They also admitted that they had previously been in Cork, that they took a house there, through an agent, paid rent for some time, but ultimately left owing rent, which was not paid; that they had got furniture and eatables from shopkeepers in Cork, and had not paid for them.

At the conclusion of the plaintiffs' case counsel for the defendants opened their case, and in the course of his address the jury interrupted him saying that they did not require to hear the Cork witnesses examined on the question of swindling. Subsequently, however, the foreman stated that they would wish to hear one or two of them.

Counsel for the plaintiffs submitted that such evidence could not be given: that no particulars had been given with the defence, and that if particulars were given in reply to a notice the plaintiffs would have been referred to the plea of fair comment, and that

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therefore any evidence of swindling must be confined to acts in Limerick. The Judge decided to admit the evidence. A house agent was then called and proved that the plaintiffs had taken a house from him in Cork, and left without notice to him, owing rent, which was not yet paid. The shopkeepers from whom they bought furniture and groceries were also produced and proved that the plaintiffs had been given credit, but had left Cork, owing them for what they got. One witness from Cork stated he had given credit to the male plaintiff, because he stated he was a retired navy officer. The other witnesses stated that he had told them he had an annuity.

The owner of the house taken by the plaintiffs in Limerick proved that they left without giving up possession of the house, that he had got in by the back door, which was left open, and found the house empty and deserted, but with blinds and curtains up.

The furniture dealer to whom the plaintiffs had sold their furniture said the female plaintiff had told him to come for it by night, and to come the back way, by the lane.

The editor of the *Limerick Chronicle*, who wrote the article complained of, stated that he wrote it on information received from a member of the staff founded on town talk, that he knew nothing about the plaintiffs or their names when he wrote it, and that it was written *bona fide* and without malice. In cross-examination he stated his information dealt with the traders in Limerick, and that the charge in the libel was a charge of obtaining goods in Limerick by false pretences.

At the close of the defendants' case the Judge, at the request of the plaintiffs' counsel, ruled that there was no evidence to support the plea of fair comment, the case having been really fought on the plea of justification.

Counsel for the plaintiffs also asked the Judge to rule that—(1) there was no evidence to support the charge that the plaintiffs intended to swindle elsewhere than in Limerick; (2) that there was no evidence of any false pretence in Limerick on which goods were obtained; (3) that there was no evidence of any transfer of custom.

The Judge assented to the last requisition, but as to the two

former decided to leave the case generally to the jury, pointing out that the libel was pleaded as a whole with no express innuendo, and that the justification was pleaded to it as a whole. The Judge then charged the jury, and at the conclusion of his charge counsel for the plaintiffs asked him in writing to direct the jury that there was no evidence to support the following imputations contained in the libel, viz.:—From the words commencing "a pair of swindlers" down to "in which to carry on their swindling." From the words "they were enabled to live on the fat" down to "became too pressing." From the words "their landlord" down to "as a blind to passers by." From the words "almost all" down to "no payment made." From the words "to disarm suspicion" down to "call for a month," and from the words "there is a strong determination" down to "obtaining goods on false pretences."

The learned Judge refused so to direct.

The jury found for the defendants on the plea of justification, and the Judge gave judgment for them, but respited execution.

The plaintiffs now moved to set aside the verdict and judgment on the ground that the Judge ought to have directed the jury to find a verdict for the plaintiffs, inasmuch as there was no evidence to support the imputations in the libel as above set out in the requisition made by their counsel at the trial, and on the ground that the Judge misdirected the jury in point of law that there was evidence to support the several imputations above-mentioned and refused to accede to the said requisition, and that a new trial should be ordered on the ground of the non-direction and misdirection of the Judge in respect of the matters aforesaid, and on the further ground that the verdict was against evidence and the weight of evidence.

Moriarty and *Phelps*, for the plaintiffs.

Serjeant Dodd and *Jefferson* (with them *Redmond Barry, K.C.*), for the defendants.

Cur. adv. vult.

The judgment of the Court was delivered by the Lord Chief Baron.

K. B. Div. 1903.

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June 23.

PALLES, C. B.:—

This is an application to set aside the verdict on the ground, *inter alia*, of misdirection. The notice does not specifically rely on the reception of illegal evidence, but as the evidence, that has been mainly the subject of argument here, was objected to at the trial, and as it is the common case of both parties that, having been received, it was left to the jury as evidence bearing on the issue, if it were improperly received, its submission to the jury was misdirection.

I am of opinion that the evidence as to alleged acts of the plaintiffs in Cork was illegally admitted, that substantial wrong was thereby occasioned on the trial, and that consequently there ought to be a new trial. The rule always has been that when the Court directs a new trial, it will not refer to any part of the case that may affect or bear upon the second trial, save so far as may be necessary to indicate its view on any legal questions that may be useful to the Judge at the second trial. I therefore purposely abstain from making any observations as to the sufficiency of the evidence, which was the second ground that was argued by Mr. Moriarty. It is not absolutely necessary to decide in the present case the effect in an action of libel of a defence of justification by reason of its truth; when neither on the defence itself, nor in any particulars, is there a specification of the acts of the plaintiff from which the inference involved in the general charge is drawn. No doubt the plaintiff can obtain particulars by asking for them. But the question of the effect at the trial of these not having been given when they ought to have been, and, in consequence of not having been asked for, have not been given at all, it is not absolutely necessary to determine. I should like, however, to state my view of the law upon the subject.

It was elementary law from *J'Anson* v. *Stuart* (1) that, in justification of a general charge, the specific instances relied upon should be given. The reason of that rule was not any technical matter of procedure, but the solid ground of justice that when a general charge was made and justified as true, the person incriminated should have notice before he came to trial of the real matters

(1) 1 T. R. 748.

he was called upon to meet. So the law stood from the time of *J'Anson* v. *Stuart* (1), and it was administered with such strictness that a failure of justice often occurred by reason of some technical defect in the plea of justification. Then came our Common Law Procedure Act of 1853, by, or in consequence of, which a change in the mode of pleading was introduced. Instead of pleading specially in libel a justification by reason of the truth of a general charge, you might plead generally, provided you accompanied your plea with a notice containing sufficient specific particulars. That is, you might give the plaintiff the notice which justice required, and which was the reason of the rule in *J'Anson* v. *Stuart* (1), but in pursuance of the policy of simplifying pleading that notice might be given, not in the very plea itself, in which unusual strictness was required, but in a document *dehors* the plea, but referred to in it, with the advantage that the statements in the particulars were not required to be quite as technical as statements in a plea. *Hort* v. *Reade* (2) will be found to do no more than import into this country, under our Common Law Procedure Act, the doctrine that had previously obtained under the Common Law Procedure Act in England of allowing, as a justification of a general charge, a plea of the truth, coupled with particulars, contained not in, but *dehors* the plea. In other words, that which formerly should be done in the one document on the file, which techically was called a pleading, thenceforth might be done in two documents—one, the document on the file, and the second a notice, which was made by practice part of the first. In *Hort* v. *Reade* (2) O'Brien, J., says:—"He" (the defendant) "may adopt the more convenient course of stating in general terms that those words are true in substance and in fact. The recent decisions to which we have been referred show that a plea of justification in that general form is allowable; and that the necessity (which formerly existed) of stating in such a plea the several matters on which the defendant intends to rely in justification would be obviated by his giving particulars of such matters in a separate notice."

Gourley v. *Plimsoll* (3) has been relied upon by Serjeant Dodd

(1) 1 T. R. 748. (2) I. R. 7 C. L. 551. (3) L. R. 8 C. P. 362.

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as being an authority in favour of his view; but there Chief Justice Bovill, whilst stating that, as a general rule, the more convenient course in actions of libel is that which has been usually adopted in modern times, states "that rule as being that the plea of justification in general form should be allowed *with full particulars* of the matters intended to be relied upon in justification." Grove, J., whilst saying that a special plea of justification was very inconvenient, and that he never saw any substantial benefit from it, says:—"The real question between the parties can be just as well tried on a general plea *with particulars*." So far the Courts made no invasion upon the right of the plaintiff to know the charge against him which was to be investigated.

Then came our Judicature Act, and the Rules made thereunder; and, in my opinion, those Rules make the obligation of the defendant to furnish particulars with his defence much stronger than it was under the Common Law Procedure Act. There are two Rules. One (Rule 4 of Order XIX.) is that the material facts on which the party pleading relies for his claim or defence shall be pleaded, although not the evidence by which they are to be proved. The second is that which was so often called attention to during the argument, Rule 6 of the same Order:—"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) *shall be stated in the pleading*; provided that, if the particulars be of debt, expenses, or damages, and exceed three folios, the fact must be so stated, *with a reference*" (*i.e.* in the pleading) "to full particulars already delivered, or to be delivered with the pleading." Serjeant Dodd says that although a defence of fraud may be within this Rule, a defence of justification of a general charge by reason of the truth is not within it, because, he says, a plea relying upon fraud would have been bad under the law as it stood before the Common Law Procedure Act, unless particulars were stated, but that a plea of truth of a general charge in libel would have been good. I cannot concur in that argument. If *J'Anson* v. *Stuart* (1) be examined, it will be found that

(1) 1 T. R. 748.

the ground that the plea there was held to be bad was because the facts that were omitted were material facts. When you say that a general charge is true, you do not state any fact which is a material fact within the meaning of the Rule. You state a conclusion that must be deduced from a number of other facts. *J'Anson* v. *Stuart* (1) and the cases which follow it show that these other facts are material facts as distinguished from evidence. Had they been no more than evidence, then the decision of *J'Anson* v. *Stuart* (1) must have been wrong. At common law it never was necessary to plead mere evidence. Rules 4 and 5, taken together, in my opinion, make it clear that in strict regularity there should have been a reference in the statement of defence to the particulars which would thus be made part of it. As it is a general rule that material facts not stated in the pleading shall not be given in evidence, I should have thought that if particulars were not stated or referred to in a plea of justification of a general charge, and if the parties went to trial in that state of pleading, in strictness no evidence would be admissible upon the plea of justification, unless an amendment were allowed at the time. And I should have thought that the provision made in the subsequent Rules of this Order—Rule 7 and the others—was a supplementary provision giving additional rights as to, in the words of the Rule, "*better*" particulars that the parties might, by interlocutory application before the trial, know the exact case to be met. But I do not wish to lay down any general rule as to what ought to be done if a person simply took issue without asking for particulars, and went down to trial. It is possible that were there no notice whatsoever of particulars, either in the pleading or the notice, the Judge might make an order allowing particulars to be given on the moment if he thought that the opposite party was taken by surprise, or adopt some other course which would prevent the trial becoming abortive. But I think that the strict rule is that in such a case, without an amendment, the evidence is not admissible.

However, it is not necessary, as I have already said, to decide that exact question in this case, and for this reason. The Judge

(1) 1 T. R. 748.

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at the trial could not have refused to receive any part of the evidence that had been given *as to transactions in Limerick*, because the 7th paragraph—that which relies on a privileged communication—sets them all out. Then that 7th paragraph is followed by the 8th, in which the truth is relied on—the paragraph on which the question here arises. No doubt, they are two separate paragraphs, and perhaps, in form, two separate pleas; but as evidence of the facts stated in paragraph 7 was admissible for the purpose of proving that paragraph (if they amounted to a defence under paragraph 8), if any amendment were necessary, which I doubt, it would be no more than to add words which would identify the facts relied upon in paragraph 8 as being what are called the circumstances in paragraph 7; and such an amendment was one which the plaintiffs were bound to anticipate, and to be prepared to meet. I am perfectly satisfied that that was the case the plaintiffs came to meet. When the case was stated by the plaintiffs' counsel he must have stated that the matters stated in the 7th paragraph were not true, and he is bound by conduct to the same extent as he would have been bound by pleading, had paragraph 8 stated the facts mentioned in paragraph 7. But it is urged upon us that the plaintiffs ought to be bound by the conduct of the trial to admit that the plea relies not only on the matters stated specifically in the 7th paragraph, but also on additional particulars, of which it does not appear they had a shred of notice. We are asked to do this by severing from the 8th paragraph the facts stated in the 7th, and thus construe the 8th in a sense which would make it, if not bad in law, at least irregular, and which would have been set aside if particulars were not given. This we are to do in favour of the party whose pleading it is. Had particulars been ordered, I do not entertain a doubt that the particulars which would have been given would have been those that were stated in paragraph 7, because the editor has stated that the swindling he referred to was swindling in Limerick. Therefore, on the ground, first, that in strictness there should have been a reference in the plea to particulars, and there being no such reference, this plea was not capable of being proved without some amendment or particulars; and, secondly, that there is, on a liberal construction of this pleading, a statement of particulars,

by which the defendants are limited, I hold that the evidence of acts that took place in Cork was not admissible, and, therefore, that the verdict must be set aside.

We have considered the question of costs. We direct that the defendants shall, under any circumstances, abide their own costs of the trial and the argument. It was their counsel that insisted upon the reception of this evidence, and to this extent they must bear the consequence of such insistence. As regards the plaintiffs' costs, we make them costs in the action. We do not give them to them in the first instance, because, if their action is an unmeritorious one, and they are ultimately defeated, there is no reason in anything that has occurred why the defendants should pay them.

J. L.

Appeal. 1904. Jan. 12–14.

The defendants appealed to the Court of Appeal (1).

Serjeant Dodd and *Redmond Barry, K.C.* (with them *Jefferson*), for the appellants :—

The evidence of the Cork witnesses was admissible as tending to establish that the plaintiffs acted as they did in Limerick in pursuit of a system, and as negativing accident, or mistake, or any reasonable, honest motive : *The King* v. *Wyatt* (2); *The Queen* v. *Francis* (3); *The Queen* v. *Rhodes* (4).

The right to demand particulars was waived. There was no objection taken to the admission of the Cork evidence based on the ground of surprise. The plaintiffs themselves admitted in cross-examination all that the Cork witnesses proved.

[HOLMES, L.J.: That is so : with the exception of the statement made by one Cork witness that the male plaintiff told him he was a retired naval officer.]

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

(2) 20 *Times* L. R. 68.
(3) L. R. 2 C. C. R. 128.
(4) [1899] 1 Q. B. 77.

Appeal. 1904.

HEWSON v. CLEEVE.

Moriarty and *Phelps*, for the respondents :—

The charge in the libel is for obtaining goods by false pretences in Limerick. The editor who wrote the article admitted this. There is no evidence that they obtained goods by false pretences in Limerick. There is no evidence that they obtained credit by false pretences in Limerick. To prove the criminal offence the intention not to pay must be proved. The Cork evidence was not admissible for want of particulars: *J'Anson* v. *Stuart* (1); without particulars the plea of justification is a nullity. Possibly the particulars given in the plea of fair comment may be treated as particulars for the plea of justification, but they relate only to matters in Limerick, and do not enable evidence of acts in Cork to be given. *Cook* v. *Field* (2) shows the importance of strict practice in reference to pleading justification, because if the libel charges an indictable offence on the finding of justification the plaintiff can be put on trial without being brought before the Grand Jury. Here also the affidavit made by the defendants on the venue motion stated that all their witnesses lived in Limerick. *Gordon-Cumming* v. *Green* (3) proves that where a charge is not specific the plea of justification should give particulars. *Scott* v. *Sampson* (4), decided on Order XIX., Rules 4 and 6, decides that without particulars this plea is a nullity. *The Isis* (5), *Yorkshire Provident Life Assurance* v. *Gilbert* (6), *Mosse* v. *Malings* (7), show how a pleader is bound by the particulars given.

Further, even if the Cork evidence is admitted it will not justify the libel. There is no evidence that the plaintiffs obtained goods on credit by false pretences. The plea is one and entire, and unless the entire plea is proved the defendants must fail: *The Queen* v. *Newman* (8).

Jan. 14.

LORD ASHBOURNE, C. :—

This case comes before the Court on appeal from the King's Bench Division, who made an order directing that a new trial should take place. It is an action of libel brought by two

(1) 1 T. R. 748.
(2) 3 Esp. 133.
(3) 7 *Times* L. R. 408.
(4) 8 Q. B. D. 491.
(5) 8 P. D. 227.
(6) [1895] 2 Q. B. 148.
(7) 33 Ch. D. 603.
(8) 1 Ellis & Blackburn, 558.

plaintiffs—husband and wife—against the owners of a newspaper in Limerick, and the libel complained of was a paragraph which appeared in the newspaper, headed "Swindlers in Limerick—Traders Victimised," and containing an account of how a "pair of swindlers," who had been staying in Limerick, had departed without paying their bills, and leaving local tradesmen lamenting. The statement of claim set out the entire libel. The defence contained the usual traverses and a long plea, in paragraph 7, alleging that the words complained of were "fair comment," and mentioning as matters of fair comment practically a paraphrase of the libel set out in the statement of claim. Next came paragraph 8, raising the plea of justification, shortly alleging, in general terms, that the libel was true in substance and in fact. No particulars were referred to in reference to this plea. None were given by the defendants, and none were asked for by the plaintiffs. The case was tried before Kenny, J., and a special jury in Limerick, and resulted in a verdict for the defendants. The plaintiffs' case at the trial was at the opening fully stated by their counsel: they were examined at length in support of it, and they gave their evidence in much detail: they were then cross-examined apparently very searchingly by the defendants' counsel. Amongst the topics as to which they were cross-examined were matters not only connected with their residence in Limerick, and the debts that they incurred there, and the accounts that they left unpaid there, but also matters in reference to their previous residence in Cork, and as to the debts incurred, and demands left unsatisfied by them in that city. Then in due course Mr. Bushe opened the defendants' case, and his statement of it appears to have impressed the jury very much, for the foreman intimated in the middle of his speech that they did not require to hear any of the Cork evidence. Later on, one of the jury said they would like to hear some of the Cork evidence, and when Mr. Bushe tendered it, Mr. Moriarty, for the plaintiffs, objected to it. This Cork evidence was received by the Judge, and is now before the Court. It is little more than a bald statement of the debts that had been left unpaid by the plaintiffs when they left Cork, very much the same in effect as they themselves had stated in their cross-examination. I believe there is only one point that is practically not covered by

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what was admitted by the plaintiffs in cross-examination—that is the statement made by one witness that the plaintiff mentioned something about his having been connected with the naval service, and that is a point to which the Judge at the trial did not attach much weight. At the trial the case was tried out on this plea of justification, upon the broad defence that the whole charge was true in substance and in fact, and the result was a verdict for the defendants.

A new trial motion was then instituted, and came before four Judges of the King's Bench Division, the Lord Chief Baron presiding. The contention addressed by the plaintiffs' counsel to the Divisional Court was that the Cork evidence had been wrongly received at the trial, that having been admitted by the Judge, coupled with his refusal to direct the jury in the manner required by Mr. Moriarty, there occurred what amounted to a misdirection, and that therefore there should be a new trial directed. The question discussed turned entirely upon the reception of the Cork evidence, which it was contended was illegal. To this contention the Chief Baron yielded, resting his judgment mainly on the provisions of Order XIX., Rules 4 and 6.

With much that was said by the Lord Chief Baron in his judgment I entirely agree, but still I must remain impressed by the conduct of the plaintiffs themselves all through this litigation, and also by the course of the trial.

The plea of justification, absolute and unqualified in its terms, is as general as can be conceived—that the libel was true in substance and in fact. There can be no special demurrer now. The plea is there. It is a plea that is sanctioned by law. I am disposed to think that in this case it would have been reasonable for the defendants themselves, having regard to the nature, character, and length of the libel, to have added some particulars referring to occasions and dates which they had in their minds at the time the plea was drawn. Rule 6 would appear to indicate that that would have been a reasonable course to have taken here; that Rule, however, is for the protection of suitors; its object is to prevent the opposite party being taken by surprise; but there is nothing to prevent a party waiving the benefit of its provisions, and I think that is precisely what the plaintiffs have done here.

Knowing that this was a general plea of justification without any particulars given, they could have asked for particulars, and if they were not satisfied with such as were then given to them, they could have applied to the Court for further particulars, making the case that they did not wish to have to go through every item of their lives—to go to trial with no particulars present to their mind —and if such an application had been made, I think it would have been reasonable to accede to it. But that course was not adopted by the plaintiffs. On the contrary, they elected to join issue, and were satisfied to await the trial, and fight out the truth of the charges so generally pleaded. Having then this general plea before him at the trial, without any narrowing particulars, the plaintiffs having been very fully cross-examined with reference to their dealings in Cork, when this Cork evidence was tendered, what was the learned Judge to do? It was argued that it was illegal for him to receive this Cork evidence. It might have been illegal if the plaintiffs had asked for particulars, and they had received in reply a statement that the particulars would be found in the plea of fair comment, or that the particulars would be found in their dealings with certain Limerick tradesmen. If particulars had been supplied by either reference or direct statement relating entirely to Limerick, then I could quite appreciate the force of the argument that it would have been improper to have received evidence as to Cork or any place outside the particulars. The Lord Chief Baron liberally construed the pleading as giving for the purposes of the plea of justification the particulars given for the plea of fair comment, which were particulars relating solely to dealings in Limerick, and therefore he held that evidence of acts which took place in Cork was not admissible. If I could construe the pleading in this manner, I should arrive at the same conclusion. But I read the plea of justification as standing by itself—a general allegation that the charges made in the libel were true in substance and in fact, with no particulars narrowing them.

When the Cork evidence was tendered at the trial, I could well conceive the plaintiffs' counsel saying to the Judge:—"This comes on us, we do not say technically, but as a real surprise: we thought from the preceding defence of fair comment that we had

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to deal only with acts in Limerick: we were led further to that conclusion by an affidavit made for a venue motion which stated that the defendants intended to use only the evidence of persons residing in Limerick: accordingly we are not in a position to go on with the trial satisfactorily to our clients if this Cork evidence is pressed, and we therefore ask you to reject the evidence of the Cork witnesses, or if you think there is no legal ground for so doing, to postpone the trial and give us an opportunity of meeting the wider case so made." Had I been the presiding Judge, and had such an application been made to me, I should have felt disposed to yield to it. But that was not the course taken. The learned Judge was not asked on the ground of surprise to postpone the trial or to give the plaintiffs an opportunity of meeting the Cork evidence. He was asked to reject all this evidence point blank as being illegal to receive. We have here a defence stating that the charges made in the libel are true in substance and in fact. How is it illegal to tender this evidence in reference to Cork, there being no particulars to narrow the generality of the matters that might be given in evidence in proof of such a plea? The plaintiffs' objection appears to me to raise the question of the validity of this form of plea of justification. In the authorities which have been cited in this Court, and which have been referred to by the Chief Baron, I recognise no tendency to throw doubts on the convenience or efficiency of this form of defence. Inconvenience or surprise can always be prevented by requiring particulars. Chief Justice Bovill in *Gourley* v. *Plimsoll* (1) stated that this general form of plea was convenient, and could, when necessary, be supplemented by requiring particulars of the matters relied on in justification. In the same case Denman, J., says: "The question is whether the plea in that general form should be allowed. I think such a plea affords the fairest mode of trial, the plaintiff having power to obtain particulars of the occasions and circumstances upon which the defendant purposes to rest his justification, which particulars the Courts are always very liberal in granting." The plea in this form being good in law, how is it to be argued that there was anything in the case to exclude the right of the

(1) L. R. 8 C. P. 362.

defendants to tender evidence from Cork in support of it? What is the effect of going to trial without having narrowed the plea by requiring particulars? The plaintiffs could have obtained particulars if they thought fit; they acquiesced in this general plea; they took issue upon it; they did not ask for a single particular as to name, date, or locality; they elected to go to trial upon this general form of defence, sanctioned as it is by law and authority, as being reasonable and convenient. At the trial they did not even allege surprise or inconvenience; they only said that the evidence could not be admitted. I think the evidence was clearly admissible on a plea which sought in general terms to justify the entire libel. I can see no miscarriage at the trial, no misdirection by the learned Judge. The jury having found for the defendants, I can see no reason for a new trial, and I think the appeal must be allowed.

FITZ GIBBON, L.J.:—

The Lord Chief Baron summed up his judgment in these words:—

> "I hold that the evidence of acts that took place in Cork was not admissible, and therefore that the verdict must be set aside."

I agree that, unless that evidence was legally admissible, there ought to be a new trial. But was it admissible? I wish to keep two ways of putting that question distinct.

First—irrespectively of pleading, which, after all, is only a sort of condition precedent to the reception of evidence—was the proof of the acts of the plaintiffs in Cork legal and material evidence upon any legitimate issue in the action?

Secondly—upon the pleadings as they stand—was the plaintiff in a position to give this evidence as material upon any issue raised by those pleadings?

The first question appears to me to depend upon the character of the alleged libel; upon its meaning, so far as it is clear; and upon the sense which the jury might put upon it, so far as it is ambiguous.

The libel is of a composite character. The heading "Swindlers in Limerick—Tradesmen Victimised," and the opening sentence,

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"A pair of swindlers who have recently departed from Limerick to seek fresh woods and pastures new in which to carry on their swindling," make a general defamatory charge not importing any specific offence—a charge of systematically obtaining money discreditably and dishonestly, but not necessarily criminally. Starting with this general defamatory charge, the libel proceeds to make a number of specific statements about particular transactions; and each of these, if not true, appears to me to be actionable, but not unequivocally to impute a criminal offence, though going very near it, and capable of that meaning. The reference to unpaid bills; to the betrayal of confidence; to paying cash at first, and thereby obtaining practically unlimited credit; to transferring custom to another house when the tradesmen became too pressing; to "not disdaining a loan occasionally"; to the female plaintiff's hatred of debt, and inability to sleep at night until she had repaid the amount of a small loan; and to the parties who were victimised—all this, though defamatory, seems to me not necessarily to import a specific charge of indictably obtaining money by false pretences, but rather to impute that the parties were living by dishonestly and systematically obtaining credit—in short, "living on their wits." But the concluding passage might be read as going further, because it says "the victimised ones are on the track, and as it is believed the couple have gone to Cork, where the same plausible game may be again played, there is a strong determination *to lay them by the heels*, not merely for the debts incurred, but for obtaining goods by false pretences."

I do not doubt that it would be open to a jury to find, reading the whole publication, that it imputed an indictable offence, but I cannot find that to be—as matter of construction—its necessary meaning. Therefore, one of the first questions, if not the most important question, for the jury was—What is "the sting" of the libel? Is it, on the one hand, a libel specifically charging particular crimes; in which case, unless the offences charged are proved, there must be judgment for the plaintiffs, with nominal damages at least? Or is it, on the other hand, a publication which imputes that the plaintiffs were dishonestly victimising traders by incurring debts which they could not pay; not crossing the border line of

the criminal law, yet living upon credit gained by what might be popularly described as systematic swindling?

The meaning of the closing passage is most material, because if it amounts to the specific imputation of an indictable offence, the plea of justification could not be maintained without proof of that offence. That would be the situation if the jury had found, or had been bound to find, that the sting of the libel was the imputation of a specific offence. But I think that, upon this publication, it was legitimate for the jury to find, and I think they must be taken to have found, that the libel did not charge any specific crime, but that it did charge habitual dishonesty in obtaining credit, and systematic victimising of those who gave that credit, and that this imputation was the sting of the libel. If this be the meaning of the libel, it seems clear to me that acts of dishonesty in Cork, done by people who went from Cork to Limerick "to seek fresh woods and pastures new," would be material evidence to prove *quo animo* they continued in Limerick practices and modes of dealing and of living which they had previously carried on elsewhere.

Assuming the pleading question to be out of the case, I hold it admissible and material, upon the truth of the charge of systematic dishonesty, to prove that the plaintiffs, before they came to Limerick, had carried on in Cork the same course of dealing which had resulted in loss to the Limerick tradesmen. On the question whether the acts done in Limerick were acts of "swindling" or not, the Cork transactions were, in my opinion, material evidence of dishonest intent in the similar acts done in Limerick. I therefore think that, if the pleadings allowed it to be received, the evidence of the acts that took place in Cork was material and admissible, upon the issue of justification of the general charge of swindling.

The admissibility of the evidence upon the pleadings depends upon whether the matter was sufficiently "put in issue." The plea is general—that "the statements in the alleged libel are true in substance and in fact." The rules are stated in Bullen and Leake, p. 612 (Edition of 1863):—

> "A justification of the libel or slander on the ground of its truth must be pleaded specially, and cannot be proved under the general issue.

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"As to the form in which a plea of justification may be pleaded, some uncertainty exists, and the practice is not yet uniform or settled.

"It seems, however, that where the libel is a direct charge by the defendant of specific acts, the plea of justification may be allowed to be pleaded in a general form; thus, 'that the words written and published of the plaintiff by the defendant were and are true in substance and in fact.' In such a case this general form is in effect as specific and particular as a more formal plea; for the plea in any other form need, at the present day, be only a repetition of the charge alleged in the declaration."

"When the charges contained in the libel, instead of being specific, are general, and particularly when they impute indictable matter, a general form of plea ought not to be used. It is contrary to the essential objects of pleading, namely, that the other side should be informed of what facts are to be tried, and that the Court should be able to judge whether the facts relied on are, if true, sufficient in law. The former object may, no doubt, be attained by the delivery of particulars, but there is no sufficient reason why the proper office of pleading should be superseded by this more complicated and expensive substitute. In practice, too, it is a matter of frequent experience that imputations are sought to be justified in a general form, which no one could attempt to justify specifically; and thus the test which pleading affords, even to the pleader himself, of the validity of the defence, is lost."

Applying this law to the present case, and taking the jury to have read the libel as a general charge, and not as imputing specific indictable acts, the plea here under the technical system of pleading would be good upon general demurrer, but would be insufficient or improper, for want of particularity, on *special demurrer* only. In a subsequent case, *Behrens* v. *Allen* (1)—strangely like the present—justification in the general form was expressly allowed. The libel there made wholesale charges, and also gave a number of specific instances. The declaration set out the whole libel, with an innuendo, and it was difficult, in framing the justification, to distinguish between the general and the specific charges. The defendant put in a general plea, which he was ordered to amend by justifying specifically. Subsequently Byles, J., who had directed the amendment, came to the conclusion that the issue could best be raised by a plea in the general form with particulars, and he granted a conditional order with the view of having the

(1) 8 Jur. N. S. 118.

matter submitted to the full Court, which came to the same conclusion. Willes, J., said:—

> "*J'Anson* v. *Stuart* (1 T. R. 748) makes it clear that before the Common Law Procedure Act, 1852, a general plea of justification in these circumstances was not allowed, with the exception, possibly, of a case of a specific charge in the declaration, and a plea alleging the charge to be true. In such a case as this, where the charges are mostly specific, the real question may be raised by allowing a general plea of the part specified—a general plea to that part, and a special plea to the other part. Nevertheless, I do not mean to say that in any future case I shall not reserve to myself to allow a plea of justification in libel on such terms as will oblige the parties to try the real question between them in the clearest possible form."

This case plainly shows that the plea in the general form is good in substance, and that the objection to allowing it was based upon judicial discretion as to the form in which the real question could be most clearly raised. It also shows that the general form may be supplemented by particulars, and thus the question which we have to determine is whether the condition precedent of giving fair notice to the other side, which is the first object as well of pleading as of particulars, has been waived, or so far satisfied, as to make it just to allow the defendants to retain their verdict.

J'Anson v. *Stuart* (1) was itself heard on special demurrer. The Common Law Procedure Act, 1853, section 81, enacts—

> "No pleading shall be deemed insufficient for any defect which could heretofore be objected to only on special demurrer."

The objection to the general plea of justification could be raised only on special demurrer.

The section goes on—

> "Every . . . defence . . . which shall, with reasonable clearness and distinctness, state all such matters of fact as are necessary to ground the . . . defence . . . shall be sufficient."

Under the Judicature Act, Order XIX., Rules 4 and 6, are mere repetitions or amplifications of the provisions of the Procedure Act. Each of these Rules has its own scope, but both have the

(1) 1 T. R. 748.

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same object—that which appears in Bullen and Leake—viz. giving the opposite party fair notice of what he has to meet. Rule 4 is taken from section 81; Rule 6 provides that particulars—where necessary—shall be stated in the pleading, and Rule 7 provides the remedy where they are insufficient. Here I consider that the plaintiffs were entitled to particulars, if they required them, and I hold that no particulars were given. I cannot treat the plea of fair comment as supplying particulars for the plea of justification. I will assume nothing in favour of the defendants. If I were trying the case, and had been asked to reject the Cork evidence —not on the ground that it was inadmissible or immaterial, but on the ground that no particulars had been given, either upon the pleadings or otherwise—I should have refused to receive it, except on the terms of furnishing particulars and adjourning the trial, if the plaintiffs so required, to enable them to meet it. But neither at the trial, nor here, have the plaintiffs counsel put their case upon any want of amendment or of particulars, or upon any surprise. The substance of their contention, and of the decision in the King's Bench Division, is that the Cork evidence was not admissible in law, and cannot be made admissible on any new trial. I differ respectfully from that view. I think that, even under the technical system, the evidence would have been admissible, if specially pleaded in justification of the general charge of swindling; furthermore, that the general form of plea would have been objectionable on special demurrer only, and might have been allowed with particulars; and that if no special demurrer was taken, and particulars were not asked, the evidence would have been admissible, on just terms to prevent surprise. Now that special demurrer is abolished, a party cannot put himself in a better position by omitting to call for particulars; and the adoption of the general form of justification cannot put the defendant in a worse position than that which he would have occupied under the straitest sect of pleaders. Yet this is the contention of the plaintiffs, put straight by Mr. Moriarty, who said that this plea of justification was "a nullity," and that he was entitled to call on the Judge to rule—"There is no plea which can admit this evidence." I cannot agree that this is the result of the reformation of scientific pleading.

But a material question—one of justice—remains: admitting that particulars and an adjournment ought to have been granted, if asked, before the Cork evidence was received; though they were not asked, we ought not to conclude the plaintiffs by the trial already had, unless we see that the verdict was not obtained by "surprise." Surprise in fact there was none, for every material transaction to which the Cork witnesses deposed had been in substance admitted by the plaintiffs themselves in cross-examination. It seems almost certain from what happened, that the Cork witnesses were called at the request of the jury, merely to remove all possibility of doubt as to a conclusion formed upon the evidence of the plaintiffs. But I do not rest on that.

The question, in my opinion, comes to this—Is the Court to give a new trial, allowing the defendants to amend the plea, or to give particulars, so that the Cork evidence may be received in due form? Admitting that evidence, there can be no doubt that it is enough to sustain the findings and verdict of the jury. It is an old principle that if a new trial would have the same result as the first, it ought not to be granted for defect of form, or irregularity of procedure. The most I can say for the plaintiffs is that the Cork evidence was material, but that, in strictness, it ought not to have been received, unless the defendants complied with the condition precedent of giving particulars, or pleading specially. This was not required by the plaintiffs, who contended—wrongly, in my opinion—that it was inadmissible; and, in my opinion, we ought not to grant a new trial merely for the purpose of having an amendment of procedure which would formally justify the reception of evidence, the truth of which is admitted, and which is sufficient to sustain the verdict already found.

WALKER, L.J.:—

The principal question in this case is whether the general defence of justification without particulars being incorporated in the defence or supplied by an independent document was, as argued, a nullity, so that though the plaintiffs took issue on its truth no evidence would be admissible of instances to support the defence of justification. In my opinion that is not correct. I think such a defence was bad on special demurrer before the

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Common Law Procedure Act, and since it is irregular under the Rules, so that the plaintiffs could have compelled the defendants, at the peril of the defence being set aside, to supply these particulars.

But this right to obtain particulars is a privilege given to the plaintiff in an action like the present for the purpose of enabling him to know the case he has to meet and to prevent surprise, and he may choose to say: "I will not take that course. I will try the truth of the general defence with the defendants. I know what my life has been, and fear nothing."

It was said—and this view was adopted by the Lord Chief Baron—that the statements in the plea of fair comment can be taken as particulars of the justification, and this enabled the Lord Chief Baron to avoid deciding the question whether the defence was bad on its face, and no evidence admissible of instances. I do not think the statements in the plea of fair comment can be taken as particulars of justification. They consist of a series of general statements—not specific statements—and would be in every way objectionable as particulars of justification.

Putting that aside—Was the evidence illegally received, as distinct from being evidence which should not be allowed except on terms of providing that the plaintiffs were not surprised by it? I think it was clearly evidence in the sense, at all events, that it showed the motives and system of dealing adopted by the plaintiffs in cases similar to those which happened at Limerick. If it was illegal or ought not to have been received because it surprised the plaintiffs, I would think we are not in a position to say it might not have materially influenced the jury. Being legal in the abstract on the pleadings as they stood, and on the course of the case by the common action of both sides, we have only to see whether it was objectionable on the ground of surprise. No adjournment was sought, nor was the case made that the plaintiffs were embarrassed, and, indeed, as they had each been cross-examined on all the Cork transactions, that case could hardly be made.

It is quite true, I think—looking at the plea of fair comment and what occurred on the venue motion—that the plaintiffs' advisers might not unreasonably think that they had to deal

with the Limerick case alone, and if an application to exclude the Cork evidence on the ground of surprise had been made, other considerations would have arisen.

But the contention at the trial and here was, and has been, that in point of law the evidence could not be received, and whether this contention is right depends on the consideration whether the defence was in fact a nullity.

The only other consideration which occurs to me is whether injustice was done the plaintiffs, so that a new trial should be granted. I do not think that is so, because practically everything proved by the Cork evidence had been already proved by the plaintiffs themselves on cross-examination, and I myself think there was evidence from Limerick to sustain the verdict. They had adopted the course—generally a wise one—of going into their own case fully in the first instance, and I cannot see that the receipt of the Cork evidence led to any miscarriage of justice, and I think it would be against justice now to send this case to a new trial.

HOLMES, L.J. :—

The publication which led to this action is entitled "Swindlers in Limerick—Traders Victimised"; and the charge made in it against the plaintiffs is succinctly stated in the opening sentence: "A pair of swindlers, who have recently departed from Limerick to seek fresh woods and pastures new in which to carry on their swindling, have left behind them some unpleasant reminders of their stay in the ancient city in the shape of unpaid bills." There follows an account in very general terms of the mode in which it is alleged the swindling operations were carried on. Down to the last sentence there is nothing to convey that the plaintiffs were guilty of any criminal offence. The dishonesty suggested is that by taking a fairly large and well-furnished house, by a suave manner, good appearance, ability to talk, and by at first paying cash, they succeeded in obtaining credit beyond their means, until at length a cleverly and carefully managed departure left the landlord of the house and the tradesmen who supplied goods without any chance of recovering the sums due. The final words of the article go further than the preceding paragraphs :—"There

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is," says the writer, "a strong determination to lay them by the heels not merely for the debts incurred, but for obtaining goods by false pretences." The publication is set forth in the statement of claim without innuendo; and while a jury could hardly hesitate to find the whole document a libel, the last sentence might be construed either as actually imputing to the plaintiffs the offence of obtaining goods on false pretences, or as conveying that it was intended to test whether the conduct previously described was sufficient to bring them within reach of the criminal law. The defence, in addition to formally denying the allegations in the statement of claim, pleaded, after somewhat elaborate prefatory averments, that the alleged libel was a fair comment on matters of public interest, and also in justification that the statements therein are true in substance and in fact.

No particulars accompanied the defence; nor did the plaintiffs ask for particulars. They joined issue, and went to trial on the pleadings as they stood. The two plaintiffs were examined and cross-examined. It was admitted by them that Mrs. Hewson went to Limerick as a fortune-teller; that her professional name was Madame Norma; that she called herself in private life The Honourable Georgina Hewson; that she and her husband took a good house, and after paying the rent for some time ceased to do so; that they incurred debts to six tradesmen; that they sold portion of their furniture recently, and had what was so sold removed at night on two occasions; that they left the city suddenly, leaving the curtains in the house so arranged as to suggest that it was not deserted; that they gave either no address, or an illusory one, and that some of the debts were not paid until a day or two before the trial. They also admitted that previous to this visit to Limerick they had been in Cork, where similar incidents had happened—a failure to pay rent, debts incurred to tradesmen, and sudden disappearance, and creditors still without their money. It can hardly be denied that assuming that the evidence I have referred to was legal, it would justify a verdict on the defence of justification, at least to the extent to which the alleged libel imputed general fraud and dishonesty as distinguished from actual criminal guilt.

Further evidence was given on behalf of the defendants in reference to the conduct of the plaintiffs in both Cork and

Limerick; and although it added little to what had been already admitted, the defendants' case was not weakened thereby—why then ought not the verdict and judgment for the defendants to stand? To this an alternative answer is offered. It is said, in the first place, that although no particulars of the defence of justification were given or asked for, we are to look for them in the introductory averments in the defence of fair comment; that the evidence of justification must accordingly be confined thereto; and that as they contain no reference to the conduct of the plaintiffs in Cork, everything relating to this subject ought to have been excluded from the consideration of the jury. I agree in this, if the statements in the defence of fair comment are to be regarded as particulars of the plea of justification; but I am satisfied that they were neither intended by the defendants, nor accepted by the plaintiffs as such. In fact they are not particulars at all.

The imputations in the alleged libel are general, not specific; and the averments in the plea of fair comment are equally general. They are merely a repetition of the alleged libel, and give no further information than can be derived therefrom. But here comes in the alternative argument. It is contended that, if there were no particulars, the defence of justification is bad, and no issue arises thereon. With this I am unable to agree. Particulars ought to have been delivered in this action; but their non-delivery, although an irregularity, does not vitiate the defence. The plaintiffs were entitled to an order at the defendants' expense directing particulars to be given within a specified time, or in default that interlocutory judgment be marked. But they might elect to proceed, as they have done, without particulars. Having confidence in their case, they might wish to avoid trouble and delay. In such event, the defendants would, in my opinion, be at liberty to prove the defence by any legal evidence. Now the only objection to the Cork evidence is, that it was not included in particulars. It was relevant to the issue to show that what happened in Limerick did not arise from some accidental or temporary cause, but was part of the plaintiffs' mode of life; and therefore, as under the circumstances the plaintiffs were not entitled to rely on the absence of particulars, they could not object to the evidence. If they had been able to show

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that they were taken by surprise, and were unprepared to meet it, they might have applied for an adjournment, but this was hardly possible where they had practically admitted the truth of what was proved against them.

I think that the Judge was right in leaving the publication to the jury as a whole. To have divided it into sections would have led to confusion and possible miscarriage. There was ample evidence to sustain the defence of justification, except in so far as the last sentence of the article imputed to the plaintiffs an indictable offence. But it was open to the jury to find that this was not the meaning of the final words when taken in connection with what preceded them ; and I must assume that they were fully instructed in this matter, and gave proper consideration thereto.

Solicitor for the plaintiffs : *R. Robinson Black.*
Solicitors for the defendants : *B. Barrington.*

G. Y. D.

IN THE MATTER OF THE PETITION OF CHAS. ALLEN (1).

Cr. Cas. Res. 1903. June 20.

Case stated—Juror's exemption claim—Veterinary surgeon—14 & 15 Vict. c. 90, s. 9—39 & 40 Vict. c. 78, s. 20.

A duly qualified veterinary surgeon is entitled to exemption from serving on any jury, inquest, or inquiry, by virtue of coming within the description of persons exempted in sect. 20 of the Juries Procedure (Ireland) Act, 1876 (39 & 40 Vict. c. 78), and the schedule annexed thereto, as being a "licensed medical practitioner."

THIS was a case reserved for the opinion of the Judges by Mr. Justice Andrews at the Commission Court, held for the county of the city of Dublin, on the 1st April, 1903, on the hearing of a petition addressed by Charles Allen, of the city of Dublin, veterinary surgeon, to the Right Honourable and Honourable the Judges of the Court of Oyer and Terminer and General Gaol Delivery of the said county.

The petition stated that an order had been made against the petitioner for payment of a fine of £2 for his non-attendance as a juror at the Commission Court, Green-street, on the 6th February, 1903, and that such non-attendance was not a wilful contempt of the said Court; but was occasioned by the cause "That the petitioner was a person absolutely freed and exempted from serving on any jury, inquest, or inquiry in any Court or on any occasion whatever, being a licensed medical practitioner," and he therefore prayed that the said fine might be remitted.

The petitioner was sworn and examined, and stated that he had been practising for over thirty years as a veterinary surgeon in the city of Dublin, and was still so practising; that he had been admitted as a member of the Royal College of Veterinary Surgeons upon the 19th April, 1870; and he produced his diploma of membership, certifying that he was fully qualified to practise the art and science of veterinary surgery and medicine. He also

(1) Before PALLES, C. B., and ANDREWS, JOHNSON, MADDEN, BOYD, BARTON, and WRIGHT, JJ.

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stated that he was a Fellow of the Royal College of Veterinary Surgeons, having obtained the Fellowship by examination, and he produced his diploma of Fellowship, dated 20th January, 1887; that he was President of the Veterinary Medical Association of Ireland, and at one time member of the Council of the Royal College of Veterinary Surgeons. A copy of the Register of Veterinary Surgeons, purporting to be printed and published in pursuance of the Veterinary Surgeons Act, 1881 (see 44 & 45 Vict. c. 62, sect. 9) was produced, and also copies of the Royal Charters of the Royal College of Veterinary Surgeons, dated, respectively, 1844, 1876, 1879, 1883, and 1893, in the volume containing the Register of Veterinary Surgeons, and published according to Act of Parliament. The Judges were requested to give their opinion on the following questions, namely:—

1. Is the petitioner entitled to the exemption he claims from being returned, and from serving on any jury, inquest, or inquiry in any Court, or on any occasion whatsoever?

2. Is the petitioner entitled to a remission of the fine referred to in his aforesaid petition?

Dudley White, for the petitioner:—

It is submitted that the petitioner is entitled to the exemption claimed as coming under the definition of a "licensed medical practitioner." The Royal Charter of the "Royal College of Veterinary Surgeons," dated 8th March, 1844, recites the representations contained in the petition to Her late Majesty, that, owing to the petitioners for the said charter not participating in the privileges and exemptions granted to the medical and other professions, much injury had arisen to themselves in the course of their practice as well as loss to their employers; and further that the said petitioners were so fully occupied in the discharge of the duties of their profession, and were so continually at the call of the public, as to be very ill-qualified to discharge, with due regard to the interests of the public, the parochial and other services which the law enforced on them; and it was therein submitted that considerable advantages would accrue to the subjects of the realm generally by enabling the petitioners and others constituting the body of veterinary surgeons to possess privileges from which they

had hitherto been excluded; and it was therein prayed that the veterinary art might thenceforth be recognised by law as a profession. This prayer was granted by the charter in terms declaring that the veterinary art as practised by the members of the body politic and corporate of the Royal College of Veterinary Surgeons should be thenceforth deemed and taken to be recognised as a profession, and that the members of the said body exclusively of all other persons whomsoever should be deemed and recognised to be members of the said profession, or professors of the said art, and should be individually known and distinguished by the name or title of veterinary surgeons.

The art of veterinary surgery having been thus recognised as a profession, admission to which is regulated by the granting of diplomas, the Veterinary Surgeons Act, 1881, section 2, defines "veterinary surgery as meaning" the art and science of veterinary surgery and medicine. Section 3 provides that a register of veterinary surgeons is to be kept and maintained by the registrar, a copy of which is in all cases to be evidence that the persons therein named are on the register of veterinary surgeons. Section 14 confirms the charters of 1844, 1876, and 1879, respectively. Section 17, sub-sect. 1, imposes a penalty on any person, other than a person who for the time being is on the register of veterinary surgeons, who takes or uses the title of veterinary surgeon, and by sub-sect. 2 a person other than those so mentioned shall not be entitled to recover in any Court any fee or charge for performing any veterinary operation, or for giving any veterinary attendance or advice. The latter sub-section excludes medical doctors strictly so-called: section 31 of 21 & 22 Vict. c. 90, defines and limits what medical doctors can themselves sue for. The definition of a duly qualified medical practitioner contained in section 34 of 21 & 22 Vict. c. 90, does not affect this case; that section refers to the particular subject-matter of the Medical Acts, which are a distinct code in themselves.

C. Atkinson, for the Crown :—

The decision of this case does not rest upon the fact of the practice of the veterinary art having been constituted a profession, but upon the construction of the Juries Procedure (Ireland) Act of

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1876. Where privileges and exemptions are created by statute, the words granting such must receive a strict and literal interpretation; and the words "licensed medical practitioner" cannot receive an extended meaning so as to include the petitioner: *Brunskill* v. *Watson* (1). By section 34 of 21 & 22 Vict. c. 90, any words importing a person recognised by law as a medical practitioner or member of the medical profession, "when used in any Act of Parliament," are to be construed to mean a person registered under that Act; and section 15 shows who are so entitled to be registered. The petitioner does not come under this definition.

[He also cited *The Royal College of Veterinary Surgeons* v. *Robinson* (2).]

White, in reply.

Cur. adv. vult.

PALLES, C.B.:—

The majority of the Judges are of opinion that the petitioner is entitled to the exemption claimed. Both questions will accordingly be answered in the affirmative.

Solicitors for the petitioner: *Peebles & Knox.*
Solicitor for the Crown: *Sir P. Coll.*

R. ST. J. C.

(1) L. R. 3 Q. B. 418. (2) [1892] 1 Q. B. 557.

THE KING (WESTROPP) *v.* COUNTY COUNCIL OF CLARE AND SCARIFF RURAL DISTRICT COUNCIL (1).

K. B. Div. 1904. April 27, 28. May 4. *Appeal.* June 21, 22.

Local government—Roads—Repair of—Liability of County Council—Refusal to keep in repair—Remedy, indictment or mandamus—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *ss.* 81, 82.

A County Council made a contract with a road contractor to maintain a road for five years. During the period, the road contractor became incapable of work, and, as the work was not performed satisfactorily, certain sums were retained by the county surveyor from time to time out of the amount payable. A new contract was made with another contractor to put the road in a proper state of repair within one month, and to keep it in good order. But before this the road had fallen into a very bad state, having been totally neglected, and the amount provided by the new contract was wholly insufficient to remedy this.

A ratepayer, whose lands adjoined the road, complained on several occasions of its condition, and demanded from the County and District Councils that they should put it into, and maintain it in, proper repair. This demand not having been complied with, he applied to the King's Bench for a writ of mandamus, to command the District and County Councils to put the road in proper repair:—

Held, by the Court of Appeal (affirming the decision of the King's Bench Division), (1) that the duty was imposed by sect. 82 of the Local Government Act, 1898, on the District and County Councils to maintain the roads in proper repair; (2) that that duty was not discharged to the ratepayers by entering into a contract to repair and keep in repair, but that they were bound to see the work done; (3) that the action of the District and County Councils amounted to a refusal on their part to perform their duty; (4) that mandamus was the appropriate remedy.

MOTION to make absolute a conditional order for a mandamus dated the 24th February, 1904, directed to the County Council of Clare and the Scariff Rural District Council, commanding them, and each of them, to put into good condition and repair the road between the three roads in Lecarrow, situate in the Scariff rural district, and county of Clare, and, if necessary for that purpose,

(1) In the King's Bench Division, before PALLES, C.B., and ANDREWS, J.

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that the Scariff Rural District Council should formulate a proposal, pursuant to the Local Government (Procedure in Councils) Order, 1899, and that the Clare County Council should assess and levy a rate upon the owners of all rateable property within the Scariff rural district, and that they and each of them, according to their respective powers, should take all other steps (if any) necessary for that purpose.

The prosecutor was the owner of the demesne of Coolreagh, where he resided, and was the landlord of considerable property in the vicinity, in the hands of tenants. He alleged that the road between the three roads in Coolreaghmore and the three roads in Lecarrow was about three miles in length, and ran through his demesne for about 350 perches, with the demesne on both sides, and the demesne bounded it on one side for a further distance of 50 perches. The only means of access to his demesne and house was by this road, and it was also necessary for him to pass along it in order to reach his tenanted lands. He had known the road well for the past twenty-four years, during all of which time it had been a public highway, and was well acquainted with the cost and mode of keeping roads in repair, both from his experience as a Grand Juror of the county of Clare, on which he had served constantly for the past thirteen years, and otherwise. The road was for many years, previous to 1893, contracted for by one Cornelius M'Guinness, who received an annual salary of £23 15*s.*, for which he was bound to supply, first, 90 cubic yards of road metal, and subsequently 110 yards, and for that he maintained the road in fairly good condition. In the year 1898 the contract for the road was taken for five years by a man named Minogue, at a salary of £13 17*s.* yearly, for which he was bound to supply 120 yards of road material yearly. About three years ago Minogue was placed in the County Clare Lunatic Asylum, and since that time the road had deteriorated. During the four years ending in July, 1898, a sum of £95 was expended upon the maintenance of the road, but during the four years commencing the 1st April, 1899, when the road was taken over by the County Council from the Grand Jury, and ending the 31st March, 1903, only £31 3*s.* 3*d.* had been so expended, while a sum of £14 4*s.* 9*d.* had been retained from the contractor, Minogue, during that period. On the 31st March, 1903,

the county surveyor, in pursuance of sect. 54 of the Grand Jury (Ireland) Act, 1836, as adopted by the Local Government (Adaptation of Irish Enactments) Order, 1899, took up the road to be worked by him out of the moneys retained from the contractor. The retained moneys were not, however, expended on the road. In consequence of these years of neglect, and the non-expenditure of the retained moneys, the condition of the road became, and now was, bad and dangerous. Bushes were allowed to grow out until two vehicles could not pass each other safely; the water-channels became choked; and the water ran in streams down the middle of the roadway, until, in many places, the naked rock protruded, affording no foothold for horses, to their great danger. Moreover, from this cause and the want of sufficient road-metal, the road had been worn hollow along nearly all the three miles of its extent, the centre being lower than the sides, and in some cases the clay protruded through what remained of the surface, and in many places there was no surface above the foundation stones. The metal supplied had been of an inferior quality, and, through neglect to pick the crust, loose stones lay about the patches dangerously. Upon the expiration of Minogue's contract, a contract was entered into with James Doyle for the wholly inadequate price of £13 7*s*. for the maintenance of 950 perches of the road, for which he was bound to supply 150 cubic yards of stone yearly, with the result that an expenditure of £120 was now necessary to put the surface into reasonably good order. Core Bridge, on the road, was also out of repair and dangerous; and the railings had been allowed to rust away. The prosecutor suffered great injury from the neglected and dangerous state of the road, and his horses were unable to bring their usual loads over it, which entailed more frequent journeys and consequent loss of time and expense. He made numerous complaints to the County Surveyor; and on the 15th October, 1903, he served notices on the Clare County Council, and on the Scariff Rural District Council, calling upon them to place and keep the road in good condition and repair, and threatening proceedings in the event of their failure to do so within the period of one month.

After the service of this notice some trifling repairs were done

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by the contractor, beginning about the 13th November, 1903, and a good deal of road-metal had been spread as on all roads at that season; but the road was still in the same condition, save that the bushes complained of had been cut.

Thomas John Westropp, civil engineer, who inspected the road at the request of the prosecutor, gave a detailed description of its condition.

The case made by the County Council through their county surveyor was that the former contractor for the road in question became unwell whilst his contract was in force, and had continued unwell until the present time. The road in question was being maintained by his relatives in his interest; but not to the satisfaction of the county surveyor, and consequently he withheld from those who were so working on the road the sum of £24 4*s.* 9*d.* Of that sum, £13 17*s.* was "struck off" by the county surveyor; but the balance was expended by him subsequently upon the road. As a result of a conference with the prosecutor, in the spring of 1903, the county surveyor agreed to employ as sub-contractor for the road a brother of Minogue, the former contractor. Having got Minogue's address from the Constabulary at Scariff, he wrote to him, giving him full directions as to what he was to do; but the letter was returned, marked "refused." He then decided to repair the road by direct labour, but was informed by the Local Government auditor in the month of June, 1903, that there was no money available for that purpose, and that, as a new contractor had been appointed, the road should be repaired by him. The new contractor did nothing with the road in the months of July, August, or September, 1903; but he was advised that there was a difficulty in the way of proceeding against him and his sureties, as the period fixed for default by the contractor was the termination of the first, or any half year during the contract. Being pressed by the prosecutor, the county surveyor again applied to the Local Government auditor for permission to spend the sum of £10 7*s.* 9*d.* withheld from the previous contractor, and not "struck off;" and on obtaining from him permission, he sent down an overseer to expend this sum in repairing the road. The contractor, seeing that he was about to take up the work, set to, and did a good deal of work on the road in the months of October and November. He

cleaned the road, and supplied and spread some 36 cubic yards of broken stones, cut and trimmed the hedges, lopped off the branches of the trees, trimmed the sides of the road, opened the outlets, and cleaned the drain, and carried out a considerable amount of other repairs. By the 13th December the contractor had supplied a further quantity of 33 cubic yards of stones, and had applied same to the road between that date and February, 1904. In February, 1904, the county surveyor's overseer put on a gang of men, who cleaned up the sides, opened the gullets, and applied about 16½ cubic yards of stone to the road. Further supplies of 32 cubic yards and 25 cubic yards of stone were supplied between that date and March 4th, and the materials were finally blended with sand to make the work complete. The road was now in good trafficable order. The water did not run along the road, but in the channels; the bushes were slashed back, the trees had been lopped, and the surface of the road had been repaired by the application of large quantities of stones. The work had been going on since October, and was in a course of completion when the conditional order was applied for. In the months of February and beginning of March, of this year, the county surveyor procured, from a distance of over three miles, and at great cost, a considerable supply of good road metalling, as the supply in the neighbourhood was unsuitable. He did not regard it as necessary to have the road picked in the winter season, as the crust of the road was then soft. He saw the road on the 13th December, and he found that the supply then put on by the contractor was well spread and applied. It had greatly improved the road, and the stones were neither loose nor dangerous.

The contracts for public works were dealt with by the council under the Procedure of Councils Order of the 30th January, 1899, and when an efficient contractor was found for the execution of any work, the council could not, it was submitted, decline to accept him, even if his price was lower than the estimated price. Contractors frequently supplied the necessary labour by members of their own families, and it was impossible to apply to labour of this kind any test by the ordinary wages paid in any scheme of direct labour, or to speculate how the work could be done by them at a much lower sum than it would cost the council by direct labour.

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The prosecutor was inaccurate in stating that any such sum as he mentioned would be necessary to be expended to put and keep the road in question in repair. He had no doubt that the contractor and his sureties, if solvent, could be compelled under their contract to well and sufficiently maintain the road for the term of their contract.

A contractor was obtained for the repair of Coolreagh bridge on the 9th June, 1903, and upon his making default a decree was obtained against him and his sureties for £1 10*s.* in respect thereof. A further presentment was about to be applied for at the April meeting of the District Council, and there had been no delay or default on the part of the council in attending to the matter. The road was not a main road, but a third-class road, and had little traffic on it, and was in a better condition now than the roads of its class in the district usually were. There had been no omission or refusal on the part of the County Council to discharge their legal obligation to maintain and keep in repair the works referred to by the prosecutor. They had done everything in their power to discharge that duty, and they, by themselves and their contractor, had expended upon the road mentioned so much money and labour from the beginning of the month of October, 1903, to the month of February, 1904, and up to the date of the application for the conditional order, that the repairs of the road were at that date almost complete, and were shortly afterwards quite finished.

The prosecutor, in reply, stated that he had spoken to the county surveyor twice a year for the past four years about the state of the railings of the bridge, and it was only after losing all hope of redress from the County Council that he instituted the present proceedings. On the 18th April, 1904, the bridge was still dangerous; some new hollow bars set in one side of the bridge in or about the month of December, 1903, were beginning to rust at the points. In spite of his complaints on the 5th April, 1903, and the 24th September, 1903, nothing was done to the road during the three months it was in the county surveyor's charge; and it was not until the 9th November, 1903, that notice was served on the contractor to perform his duties, viz. within six days of the expiration of the month from the 15th October, 1903, that

he gave the County and District Councils to put the road in repair before instituting proceedings against them. The road metal claimed to have been supplied took no account of the supply necessary in the first instance to restore the surface, which had been worn away by years of previous neglect, as witnessed by the fact that nearly two years' salary was withheld from the previous contractor, Minogue. The metal supplied was of soft, sandy stone; and no attempt was made to cross-pick the ruts, or consolidate the metal. A horse he was driving on the 18th April almost fell by standing on one of the loose stones. The road still was hollow in many parts, and was wet and soft. The foundation and soleing-stones were exposed, and in places were becoming loose for want of cover.

Vesey Fitzgerald, *K.C.*, and *Phelps*, for the prosecutor, in support of the conditional order.

O'Connor, *K.C.*, and *P. Lynch*, for the County Council of Clare.

There was no appearance for the District Council.

The arguments were the same as in the Court of Appeal, *infra*, pp. 579, 580.

PALLES, C.B.:— May 4

It is apparent that in the year 1901, when the contractor became a lunatic, this road was allowed to go out of repair, and that it has remained out of repair, at least down to a period subsequent to the conditional order. Further, I am of opinion that the weight of the evidence is that even now the road is not in the repair in which the prosecutor is entitled that it shall be. Certainly the prosecutor is entitled to have the dispute in reference to it ascertained, not upon affidavits, but in the proper and constitutional way by which questions of fact are ascertained in proceedings of this nature, *i.e.* by a jury.

Under these circumstances, and there being a duty imposed by the 82nd section of the Local Government Act upon the County and District Councils, according to their respective powers,

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"to keep and put roads in good condition of repair, and to take all steps necessary for that purpose," a ratepayer who is aggrieved applies to us for a mandamus to enforce the performance of that duty, and two answers are presented to the application. The first is that mandamus is not the proper remedy, and the second that even were mandamus, in a proper case, an apt remedy, there has not been in the present case such a refusal to perform the duty as is sufficient to authorise us to grant the writ.

Upon one point I go with the argument of the defendants. I am not at present prepared to adopt Mr. Fitzgerald's contention, that an indictment will not lie against a County Council for non-repair of a road. I am not obliged to give an absolute opinion upon the question, and I decline to do so, as it has hardly been argued; but I shall, in favour of Mr. O'Connor, assume that an indictment would lie, and I base my judgment that mandamus is nevertheless an appropriate remedy upon sections 80 and 81 of the Local Government Act.

This Act introduced a great change in Ireland by transferring to elective bodies the jurisdiction theretofore vested in Grand Juries; and it is impossible to read the statute without seeing that there was a fear at least lurking in the mind of the Legislature that possibly these newly-created bodies would not at all times perform the obligations imposed upon them by the statute. Accordingly provisions (for which I think it is difficult to find a precedent) were framed for the express purpose of compelling performance of those obligations in case of their neglect by the new bodies. They are to be found in the 80th and 81st sections.

The subject-matter of the 80th is sums of money. It contains a peremptory enactment, imposing a *personal* obligation upon the treasurer of the Council to pay out of the moneys under his control any sums required to meet judgments or decrees of competent Courts, or to comply with any enactment. Thus, a most effective remedy (and one to which we have more than once been obliged to resort in this Court) is provided in reference to the payment of money which there is a duty to pay. Then follows the 81st section, which is more general, but equally effective. "Where a mandamus is issued by the High Court to any

County or District Council, and the Council fail to comply therewith, the Court may appoint an officer, and confer on him all or any of the powers of the defaulting Council which appear to the Court necessary for carrying into effect the mandamus."

Having regard to this new power with which the Court is invested in proceedings by mandamus under this Local Government Act, let us contrast the efficacy of the two remedies suggested.

First, as to indictment, it should be one at Common Law. There is no statute, as there is in England, giving any special remedies in the event of a verdict of guilty. The ordinary Common Law practice must prevail. Nothing can be done except to impose a fine payable to the Crown, or to issue a sequestration. How will the payment to the Crown of a fine, or the issue of a sequestration, *directly* advance the remedy, and cause the road to be put into repair?

On the other hand, if we grant this remedy by mandamus, and if after verdict for the Crown a peremptory mandamus issue to put the road into repair, and if the County Council do not obey that mandamus, then the 81st section will come into play, and we will be able to appoint a person with all the powers of the County Council or District Council, and have that thing done by him which ought to have been done by them. For that reason I am of opinion that mandamus is *an* apt remedy, and *the* proper remedy, even upon the assumption that an indictment would lie.

Then comes the second question, Has there been a refusal? A demand was made in October, 1903. In determining whether there has been a refusal of that demand, a good deal of the matter that has been referred to in the argument may be left out of consideration; but of course, we must see exactly what the state of affairs was at the time the demand was made. There had been some communications with Colonel O'Callaghan Westropp. He had suggested that there should be a contract entered into with some friends of the family of Minogue. That fell through. I do not stop to inquire why. The District Council in May expressed their assent to a contract with another man, and that contract was ultimately entered into by the County Council in that month of May, 1903. But then that contract was not performed.

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The terms of it may have been very specific to put this road into a condition, at least safe, within one month. That was not done. The attention of the county surveyor was called to it, with the result I have already stated, that the road remained until this conditional order was applied for in the month of April, 1904, and still is, out of sufficient repair. Then we have the affidavit of the county surveyor, which is substantially to the effect that the road was in sufficient repair at the date of the conditional order, and which adds—"but be that so or not, undoubtedly it is now in sufficient repair." That is, it alleges that the County Council has now performed its duty; that the prosecutor is not entitled to have the road in any better repair than it is now in; that it is now in the repair in which it ought to be. That is such a refusal as is sufficient to maintain a mandamus. Were it necessary, I should be prepared to go further, and to hold that the delay and the mode in which this road has been dealt with from October, 1903, amounts in itself to a sufficient refusal for the purpose of granting a mandamus; because if there be a dispute as to the sufficiency of the repair, as there was undoubtedly here, you cannot invoke the jurisdiction of this Court (which I have already stated I hold to exist) to try by mandamus the sufficiency of that repair, unless you take the allegation of the County Council that they have performed as being in law, that which it is in substance, a refusal to do anything more towards performance.

For these reasons, I am of opinion that this writ of mandamus ought to go, and that the writ should be in the general terms of the 82nd section, and command both Councils, according to their respective powers, to keep the road in good condition and repair, and to take all steps necessary for that purpose.

I wish to add one word as to what I consider the liability of these Councils, for, in my opinion, it has not been clearly understood by them. Their duty is not satisfied by entering into a contract, or by passing a resolution of reference to their county surveyor. It is not sufficient for them to say that such and such a proposal was not made, or that the county surveyor did not send in such and such a report. The duty to keep the road in repair is on *them*. *They* are bound to do it. The statute gives them a great number of powers. They have, amongst other powers, that of entering into

a contract. But by doing so, they do not wholly discharge their duty; it is their duty to see, by their officers, that the contractor performs his duty and keeps the road in repair. The fact that there was a contract may be material in determining whether there has been a refusal, and it was in that way that it was referred to by Mr. O'Connor. But it can never be left out of consideration that the duty to the public is upon the Councils, and that as they can perform it only by others, the default of the others by whom they, the Councils, ought to have performed it, may be a breach *by them* of their statutory obligation. In other words, it will be necessary for a Council to see that its contracts are framed in an apt and proper way, so that if their contractors shall fail to perform the duties imposed upon the Council, the Council can at once procure their performance by others.

It will also be necessary for them to insist that the county surveyor shall see that the contractor performs his duty, and that, in case of default, he shall at once act on the power in the contract to procure the performance of the work by another, always bearing this in mind, that the default of the contractor or of the county surveyor may ultimately be visited upon the Council, because, by reason of such default, the statutory duties imposed upon that Council may remain unperformed.

ANDREWS, J., concurred.

J. L.

Appeal. June 21, 22.

The defendants appealed (1).

O'Connor, K.C., and *Patrick Lynch*, for the appellants:—

There was no refusal by the District Council or the County Council to put the road in repair. The county surveyor got a new contractor to make a contract to put the road in repair, and maintain it so, and we submit there was nothing more the Councils could have done. A writ of *mandamus* will not be granted against a public body, except when there is a refusal to perform a duty. There is no precedent for granting a writ of *mandamus* in such a

(1) In the Court of Appeal, before FITZGIBBON, WALKER, and HOLMES, L.JJ.

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case as this. *Reg.* v. *Rathmines and Rathgar Commissioners* (1) *Reg.* v. *Bristol Dock Company* (2); *Reg.* v. *Trustees of Oxford Roads* (3); *Glossop* v. *Heston and Isleworth Local Board* (4); *Pasmore* v. *Oswaldthwistle District Council* (5).

Vesey Fitzgerald, K.C., and *Phelps*, for the prosecutor:—

There are two questions for decision. 1. Is *mandamus* the proper remedy? 2. Has there been a sufficient demand and refusal so as to entitle the prosecutor to *mandamus*?

1. Section 81 of the Local Government (Ireland) Act, 1898, contemplates *mandamus* as being the proper method of enforcing the performance of any duty imposed on the defendants by the statute. It is also the most convenient remedy, and the only method of trying the issue as to whether the duty has been performed.

2. There was a clear demand by the notice of October 15, 1903. There has been an equally clear refusal to comply with that demand. The road was out of repair in April, 1903. No work of repair was done before the making of the new contract with Doyle in June, 1903, and no work was done by Doyle under his contract until November, 1903. The road was still out of repair in February, 1904, when the conditional order was granted. This is practically admitted, and certainly not denied by the county surveyor. It is not sufficient for the defendants to say that they have performed their duty by entering into a proper contract with Doyle. Their duty is to repair, and anything short of a performance of this duty is a refusal of the demand.

June 22.

FITZ GIBBON, L.J.:—

The judgment of this Court might be pronounced by saying that the judgment of the Lord Chief Baron appears to us to deal satisfactorily with every material point. But as the arguments have been repeated here, and some additional circumstances have

(1) 16 Ir. C. L. R. 532.
(2) 2 Q. B. 64.
(3) 12 A. & E. 427.
(4) 12 Ch. D. 102.
(5) [1898] A. C. 387.

occurred since the hearing below, and the case is important, and the parties are entitled to hear our opinions, I shall shortly state my views, although, in effect, I can only repeat what the Lord Chief Baron has said.

Two questions arise—if there has been a neglect of duty by the defendants. 1. Is *mandamus* the proper remedy? 2. If so, has the condition precedent to the issue of the writ, namely, a refusal to perform the duty, been proved?

The necessity for the intervention of the Court must be found in a breach of duty. The duty of the defendants is defined by the Local Government Act, sect. 82 (1).

> "It shall be the duty of every County and District Council, according to their respective powers, to keep all public works maintainable at the cost of their county or district, in good condition and repair, and to take all steps necessary for that purpose."

The Order under appeal follows the very words of that section, and orders the defendant Councils to keep a specified public work, —namely, the road in which the relator is interested— in a proper state of repair, and to take all steps necessary for that purpose. It was established to the satisfaction of the King's Bench, and we are all satisfied, that the road was not, and is not, in good condition or repair. It was in the hands of a contractor named Minogue, under a continuing contract to keep it in a condition of repair suitable for a work of the kind, for five years. Minogue became incapable of doing the work, and for a considerable period of time—a couple of years at least—it was completely neglected, a state of facts in which under the old law it would have been the duty, and within the power, either of the County Surveyor to take up the road and to spend the money otherwise payable to Minogue upon the road; or of the Grand Jury to get another contractor to do the work, or to proceed against Minogue's sureties. The County Surveyor and the defendants have the same power and duties now.

For a time it was intended to give the benefit of Minogue's contract to some relative of his. This could not be done, manifestly because it was not a contract out of which any money could be made. But all that is long since out of the case.

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The road meantime was going from bad to worse, and the first step towards mending it was obtaining Doyle's tender of May 11th, 1903, followed by his becoming in due course the contractor for the maintenance of the road from July 1st, 1903. Doyle's contract is in the same terms as Minogue's; and the only defence upon the merits amounts really to this, that getting Doyle to make this contract was a performance of the statutory duty of the defendant Councils. That contract, read with the qualification "so far as *words* go," would, if performed, have got rid of all ground of complaint.

> "On the presentment being made, the surface is to be cleaned, holes and ruts levelled, stagnant water drained off, dangerous holes fenced, the road made safe and convenient for traffic *within one month*, and afterwards repaired, as hereafter specified, from time to time or continuously, as may be necessary, and maintained constantly in good order during the contract—clean, hard, and even at all seasons, and without having at any time a large quantity of fresh material on the surface."

But it seems to me that to ascertain what this contract—by the understanding of the parties to it—really bound Doyle to do, we must see what "the road" was; just as when a lease of a house contains a covenant to keep it in repair, and it is proved that the house when demised was an old or dilapidated structure, it is for a jury, in determining whether it has been kept in repair, to consider the age and condition of it at the date of the lease.

Even if this contract did bind Doyle to put the road right, and to keep it so, merely making it would not discharge the defendants duty to the public. They should see that the work was done. But I hold it clear, upon the evidence, that the defendants never intended that Doyle should be bound to do the work which was necessary to put this road into "good condition and repair." At the time of this contract "the road" was one that had been so absolutely neglected that the words used could not be satisfied "within a month"; "the surface" to be cleaned was not a road surface at all; before the work of maintenance could begin, the road was so entirely out of repair that a work of *restoration* was necessary, and to show that it never entered into the contemplation of the defendants that Doyle was to do this work, it is only necessary to refer

to what they did, though the amount of the tender, and the terms of the specification as to the quantity of material to be applied annually, would be persuasive indication of the same conclusion. They had in hands a balance of the money payable under Minogue's contract. They "wrote off" a considerable portion of that money—why or how does not appear—but with the balance the County Surveyor proceeded to operate on the road, and to do some tinkering, quite insufficient to make the road right, but which Doyle would have been bound to do if the contract had been really intended to bind Doyle to perform the duty prescribed by the Act. Their statutory duty could not be performed, and it has not been performed, unless the work of restoration done by the County Surveyor, *plus* the work of maintenance undertaken by Doyle, has *put and kept* the road "in good condition and repair," within the meaning of the statute, and it certainly has not done so.

The controversy between the defendants and the Councils resulted in a plain issue. The Councils contended that what they had done—the County Surveyor's cobbling, with Doyle's repairing—performed their statutory duty; there is ample evidence of a refusal to do anything more, and their contention being wrong, they have, in my opinion, refused to perform their statutory duty.

As to the measure of their duty, I wish to repeat, and to emphasize, the judgment of the Lord Chief Baron, that as the Councils can only perform their duty by others, the default of the others by whom they ought to have had it performed is a breach of their statutory obligation. They must see that the County Surveyor takes proper steps to make the contractors perform their duties, and the default of the contractor or County Surveyor is ultimately to be visited upon the Councils whenever, by reason of the default of those persons, the statutory duties imposed upon the Councils have not been performed. I venture to put the definition of their duty shortly in this form—The duty is to see the thing done, and not merely to make a contract that some one else shall do it. The Councils are liable to the parties to whom the duty of keeping the road in repair is due, and it is no defence for them to say that they entrusted the work to some one else, who failed to do it.

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Is *mandamus* the proper remedy? No other remedy for a person who is entitled to use the road has been suggested. Indictment is no remedy to a ratepayer, because a fine payable to the Crown won't mend the road. The civil remedy by action for damages, brought by anyone suffering personal injury or special damage through the non-repair of the road, is equally ineffectual to give him a good road; it could only compensate him from time to time. It was said that section 82 (3) gives an alternative remedy. It is only necessary to read it to see that it does not; but it throws light on the question of *mandamus*:

> "If any District Council complain that a County Council, or any County Council complain that a District Council, have failed to perform any such duty as aforesaid, the complaining Council may, *without prejudice to any other remedy*, appeal to the Local Government Board, and section 15 of the Public Health Act, 1896, shall apply, with the necessary modifications, in like manner as where default is made by a sanitary authority."

A statutory remedy, expressly given "without prejudice to any other remedy," cannot take away the remedy by *mandamus*, if otherwise existing; but this section cannot apply here, because this is not a case in which a District Council complains of a County Council, or *vice versa*, but it is a case in which a ratepayer complains that both have failed to perform their duty.

Sections 80 and 81 remain. Section 80 deals with "Imperative Presentments," where the provision and payment of *money* is the matter of obligation. Section 81 provides—

> "Where a *mandamus* is issued by the High Court to any County or District Council, and the Council fail to comply therewith, the Court may appoint an officer, and confer on him all or any part of the powers of the defaulting Council which appear to the Court necessary for carrying into effect the *mandamus*."

So far as I could understand the argument by which the defendants sought to escape from this provision, it was contended that sect. 81 does not apply to this case, because it applies only to cases within sect. 80. It seems to me that cases within sect. 80 would be about the most difficult to which the procedure under sect. 81 could be applied, for they would involve striking rates and levying

money through officers appointed by the High Court. But I can see no reason for connecting sect. 81 with sect. 80, or for limiting sect. 81 to any class or form of duty. There is just as much reason for reading sect. 81 with sect. 82, the section immediately following it, and the very one which imposes the duty of keeping public works in good condition. In my opinion, sect. 81 is intended as a general legislative provision for enforcing the exercise of every power, and the performance of every duty, vested in a County or District Council. It recognises *mandamus* as the remedy for every default, and it enables the High Court to carry into effect any *mandamus* which it issues. It is a general section, and I think it my duty to express my opinion that, under its clear provisions, any County or District Council which makes default in the performance of any of its duties, can, in effect, be *superseded* by an officer appointed by the High Court to give effect to a *mandamus*. I hold under that section that the ruling authority upon the performance of those duties is the High Court, acting by *mandamus*; and that Court is empowered to enforce its *mandamus* by superseding defaulting Councils in all or any of their powers, and by appointing an officer to do whatever any defaulting Council ought to have done. The machinery may be difficult to work; but if sect. 81 is workable at all, I can see no legal obstacle to the appointment under it of the County Surveyor, or of an officer of the Local Government Board or Board of Works, to put a road into repair, and to raise the money required for that purpose, when the Councils have made default under sect. 82.

The affidavit made by the prosecutor since the hearing in the King's Bench, shows that the road is still out of repair. It also shows that the issue joined was whether Doyle's contract and the County Surveyor's work, put together, were a performance of the duty of the Councils. Having come to the conclusion that they were not, I hold that the case stands now as it did when it was before the King's Bench.

I say nothing as to the jurisdiction to order that the costs of the conditional and absolute orders for the issue of the *mandamus* should be paid by the defendants. Such an order is usual when the absolute order is treated as the close of the proceedings. But here we cannot prevent the Councils from making a return to the

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writ, and if an issue was afterwards tried, and resulted in favour of the Councils, it would seem strange that they should have been ordered to pay the costs of the preliminary proceedings in an action in which they were ultimately found not to be liable. We think that the order as to costs should not be made until there is a final end of the litigation. We think that the writ should issue; and in the event of the defendants either not making an issuable return, or intimating their intention to submit, and to do the duty which we hold to rest upon them, that they should then pay the costs. Our order will allow sufficient time to enable the defendants to take whatever steps they think right. If they plead to the writ, the case will take its course. If not, we will stay further proceedings for six months to enable them to put the road into repair. That may seem rather long, but there are some necessary preliminaries. The District Council may have to formulate a proposal, which must come before the County Council; and besides, six months will bring in the period of the year at which roads are generally mended. But we shall reserve leave for all parties to apply as occasion may require, and if the Councils do the work within the time, it will only be necessary for the relator to apply for the order as to costs, which we think to be now rather premature.

WALKER and HOLMES, L.JJ., concurred.

Solicitor for the prosecutor: *John Cullinan.*
Solicitor for the County Council: *J. F. Cullinan.*

R. D. M.

THE KING (HASLETT) *v.* JUSTICES OF COUNTIES TYRONE AND FERMANAGH (1).

K. B. Div.
1903.
Jan. 26, 27.

Licensing Acts—Indorsing conviction on license—Incorporation of statutes—Intoxicating Liquors (Sale to Children) Act, 1901 (1 *Edw.* 7, *c.* 27)—*Licensing (Ireland) Act*, 1874 (37 & 38 *Vict. c.* 69), *s.* 21.

A publican having been convicted, under the Intoxicating Liquors (Sale to Children) Act, 1901, for selling intoxicating liquor to a child under fourteen contrary to the provisions of the Act:—

Held, that the conviction could not be ordered to be indorsed on his license.

CERTIORARI.

The prosecutor, the holder of a publican's license, was charged on summons before the Justices at Petty Sessions, under sect. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, with selling intoxicating liquor to a person under the age of fourteen, such intoxicating liquor not being in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only. The Justices convicted him, fined him 40*s.*, and 6*s.* costs, and ordered the conviction to be indorsed on his license. The prosecutor having obtained a conditional order for a writ of *certiorari* to quash the conviction, on the ground that the offence in question was not one in respect of which the Justices had jurisdiction to order a conviction to be indorsed on the license, the present application was on behalf of District-Inspector Charles E. Murphy, the complainant below, to discharge the conditional order.

The Solicitor-General (*Campbell, K.C.*) (with him *Moriarty*), for the complainant below:—

Section 4 of the 1 Ed. 7, c. 27, the Act under which the conviction took place, provides that for the purpose of all legal proceedings under that Act, the Act is to be construed in Ireland

(1) Before PALLES, C.B., and BARTON and WRIGHT, JJ.

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as one with the Licensing (Ireland) Acts, 1833-1900. The statutes so incorporated include the Licensing (Ireland) Act, 1874, the 21st section of which provides that a conviction for any offence against that Act may be recorded. Where it is enacted that two Acts are to be read together, every part of each Act must be construed as if the two Acts had been one: Hardcastle on Statutes, page 230. The case, therefore, must be dealt with as if there were but one Act creating this offence amongst others, and containing a provision enabling all offences under the Act to be recorded.

Henry, K.C., and *Bird*, for the prosecutor:—

Three classes of cases were provided for by the Licensing Act, 1872:—1, Offences such as those mentioned in sections 5, 6, 83, and 84, a conviction for which must have been recorded; 2, offences such as those mentioned in sections 13, 14, 16, 17, and 78, where the conviction was to be recorded unless the Justices otherwise directed; and 3, a number of offences were created, which were not recordable. Section 7 creates an offence very analogous to the present, yet it was not recordable. The Licensing (Ireland) Act, 1874, by the 21st section, abolished the distinction between convictions which must be recorded, and those which might be recorded, and in all such cases gave the Justices a discretion; but the distinction is still retained between offences which are recordable, and those which are not. All offences under the Act of 1874 are made recordable; but only those offences under the Act of 1872 are made recordable, which, before the Act of 1874, must have been, or might have been, recorded. The statute 1 Edw. 7, c. 27, contains no provision making the present offence recordable, and the mere fact that it incorporates statutes forming a code comprising offences, some of which are recordable, and others are not, cannot have the effect of making this offence recordable. [PALLES, C.B., referred to *The Queen* v. *Wall* (1).]

Moriarty, in reply:—

The Queen v. *Wall* (1) is really in our favour. The ground of decision of the Court of Appeal in that case was that the Market

(1) [1898] 2 I. R. 762.

and Fairs Clauses Act of 1847 was not incorporated with the Dublin Corporation Act, 1890; if the Court had been of opinion that it was incorporated, the decision would have been different. [He referred to the observations of Lord Selborne in *Canada Southern Railway Co.* v. *International Bridge Co.* (1).]

PALLES, C. B.:—

We are all of opinion that this conviction is not recordable. The question depends upon the construction of sect. 4 of 1 Ed. 7, c. 27, which provides that "for the purpose of all legal proceedings under this Act, this Act shall be construed . . . in Ireland as one with the Licensing (Ireland) Acts, 1833-1900," which comprise a long series of Acts, amongst others, the Licensing Act, 1872, and the Licensing Act (Ireland), 1874, which are the earliest Acts which refer to recording convictions on licenses. The Act of 1872 constituted three separate classes of convictions:—1, Convictions which were not capable of being recorded; 2, those as to which the Justices had a discretion whether they would record them or not; and 3, those which it was mandatory to record. As to the first and third classes, the Justices had no discretion. Then came the Act of 1874, the first section of which provided that that Act and the Act of 1872 "shall, so far as is consistent with the respective tenors of such Acts, be construed as one Act." Section 21 altered the provisions of the Act of 1872 as to recording. It did not, however, enable any conviction not recordable under the Act of 1872 to be recorded; but it amalgamated the second and third classes of convictions which I have mentioned, viz. those convictions which *might*, and those which *must*, be recorded, and as regards both these classes so amalgamated into one, and also as regards convictions for any offence against the Act of 1874, it gave the Justices a discretion whether they would record or not.

The effect of this legislation would, *primâ facie*, appear to be that thenceforth convictions under these Acts should be of two classes: 1, those not recordable; and 2, those recordable at the discretion of the Justices. Mr. Moriarty, however, contends that

(1) 8 A. C. 723, at p. 727.

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the effect is wholly different. He says we have a code (containing, *inter alia*, the Acts of 1872 and 1874, which are to be construed as one Act), and in that code is contained the section of the Act of 1874, which makes any offence *under that Act* recordable, and as that section is to be construed as part of the Act of 1872, therefore a conviction for any offence under that Act is recordable. He bases this argument on a sentence in the opinion of Lord Selborne in the *Canada Southern Railway Co.* v. *International Bridge Co.* (1). The words of Lord Selborne, on which he relies, are these: "It is to be observed that these two Acts are to be read together, . . . and, therefore, we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy making it necessary to hold that the later Act has, to some extent, modified something found in the earlier Act."

There is no doubt that this is the general principle of construction; but it has been settled by a long line of authorities that this reading of every part of each Act as if it had been contained in one Act, does not, in the absence of an assisting context, extend to the subject-matter of all the Acts provisions, which in their terms are confined to that of one only of the Acts. It is sufficient to refer to *The King* v. *The Trustees of Norwich and Watton Road* (2); *Ward* v. *Stevenson* (3); *Mather* v. *Brown* (4); and *The Queen* v. *Wall* (5). Indeed, even were the rule different, the language of section 21 of the Act of 1874 affords cogent affirmative evidence of the intention of the Legislature to exclude from its operation convictions which, under the Act of 1872, were not recordable.

The result is that the *certiorari* must go.

Solicitor for the prosecutor: *W. D. Graham.*
Solicitor for the complainant below: *Sir P. Coll.*

J. G. T.

(1) 8 A. C. 723, at p. 727.
(2) 5 Ad. & E. 563.
(3) 1 New Sess. Cas. 162.
(4) 1 C. P. D. 596.
(5) [1898] 2 I. R. 769.

MURPHY, APPELLANT; GRADY, RESPONDENT (1).

K. B. Div. 1903. June 22.

Landlord and Tenant Law Amendment Act (Ireland), 1860 (23 & 24 *Vict.* c. 154), *s.* 86—*Caretaker—Demand of possession by bailiff orally authorised by landlord.*

By section 86 of the Landlord and Tenant Law Amendment Act (Ireland), 1860, in order to found a summons for the recovery of premises under the section, demand of possession must be made by the owner, or his known agent or receiver:—

Held, that a demand of possession made by a bailiff orally authorised to make it by the owner, where such authority was known to the person from whom the possession was demanded, was a sufficient demand within the section.

CASE STATED under 20 & 21 Vict. c. 43.

At a Petty Sessions held at Ballyhadereen, in the county of Roscommon, James Grady, the respondent, was summoned to appear and show cause why possession of part of the lands of Cloonaholly, of which he was caretaker, should not be delivered up to the appellant as owner thereof. The appellant had brought a civil bill ejectment against the respondent to recover the lands in question for non-payment of rent, and had obtained a decree for possession on the 6th January, 1902. The necessary notices under the 7th section of the Land Law (Ireland) Act, 1887, were served and posted. On the hearing of the present summons John Callaghan, a bailiff of the appellant, was examined as a witness on behalf of the appellant. It appeared from his evidence that he had been a bailiff on the estate for thirty-two years, and was well known to all the tenants during that time as bailiff. The appellant gave him a list of the names of persons (including respondent) against whom the appellant had obtained ejectment decrees, and orally directed him to demand possession from each tenant whose name was on the list. Callaghan went to the house of Grady, whom he knew well, and demanded possession of him in

(1) Before PALLES, C.B., and BARTON and WRIGHT, JJ.

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appellant's name. The respondent said he would not give possession.

The solicitor for the respondent contended before the Justices that the demand of possession under sect. 86 of 23 & 24 Vict. c. 154, must be that of the owner, known agent, or receiver, and that demand by a bailiff was insufficient unless he was authorised in writing by the owner, known agent, or receiver, to make it, and that the demand was not that of the owner, known agent, or receiver, unless it was either made by one of them in person, or else a written demand signed by one of them and served by the bailiff so authorised, and that as Callaghan was not so authorised in writing to demand possession, and did not serve any such written demand, his demand was not such as to satisfy the section. Counsel for the appellant contended that the demand of possession required by the section need not be personally made by the owner, or his known agent or receiver; that the owner, his known agent or receiver, could by parol empower a person to make such demand, and that the person so empowered could by parol demand possession.

The majority of the Justices being of opinion that the demand of possession was not sufficient, dismissed the summons, but on the application of the complainant therein, stated the present case, the questions for the determination of the Court being—1, Was the authorisation given by the complainant to John Callaghan sufficient to entitle the said John Callaghan to make the demand of possession required by the 86th section of the 23 & 24 Vict. c. 154? 2. Was the demand made by John Callaghan a valid and sufficient demand of possession within the meaning of the said section?

Hynes (with him *Henry, K.C.*), for the appellant:—

We submit that the demand of possession need not be made personally by the owner, or his known agent or receiver; any of such persons may authorise some other person to make it, on the principle of *qui facit per alium facit per se*. The majority of the magistrates here seem to have thought that, because in *Massereene* v. *Bellew* (1) there happened to have been a written authority given to the bailiff,

(1) 24 L. R. Ir. 420.

a written authority is necessary in every case. There is nothing, however, in the statute requiring such authority to be in writing. [He referred to *Riddell* v. *M'Goldrick* (1).]

Monahan, for the respondent:—

The demand here was not sufficient. The maxim *qui facit per alium facit per se* does not apply, because the section expressly names the class of agents who may make the demand, viz. the known agent or receiver of the owner; the person to make the demand must, therefore, be confined to the persons named in the section, that is, the owner, or his known agent or receiver: *Miles* v. *Bough* (2). At all events, if authority can be deputed to an agent other than the known agent or receiver of the owner, such authority must be given in writing. The word "agent" is defined in the English statute 1 & 2 Vict. c. 76, sect. 7, as any person usually employed by the landlord in the letting of the premises, or in the collection of the rents, or specially authorised to act in the particular matter by writing under the hand of such landlord. When the Legislature gives a word a particular construction, it is, *prima facie*, to be understood in the same sense in cognate statutes: *Goldsmid* v. *Hampton* (3); *Williams* v. *Lear* (4); Maxwell on Statutes, 3rd ed., p. 432.

Henry, K.C., in reply:—

The scheme of the 86th section of the 23 & 24 Vict. c. 154, is to put all the persons named, the owner, the known agent, and the receiver, in the position of principals. It is the same as if there was a definition clause in the statute providing that the word "owner" shall include known agent or receiver. Any one of such persons, therefore, being principals, may appoint another person to make the demand on his behalf, on the principle of *qui facit per alium facit per se*. The 1 & 2 Vict. c. 74, cannot affect a statute like the present, which forms part of a wholly different code. [He referred to *Lows* v. *Telford*. (5)]

(1) Lawson's Registration Cases, 1894-1900, p. 172.
(2) 3 Q. B. 845.
(3) 5 C. B. (N. S.) 94.
(4) L. R. 7 Q. B. 285.
(5) 1 A. C. 414.

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PALLES, C.B.:—

I am of opinion that the view of Mr. Holmes, R.M., was right, and, consequently, that both questions should be answered in the affirmative.

There was clear evidence that the bailiff was authorised to make the demand, and that his authority was known to the person in occupation on whom the demand was made. He, however, was not the land agent or the receiver of the landlord, nor was his authority one conferred by writing. The question is, was a demand by him a sufficient demand under sect. 86 of 23 & 24 Vict. c. 154? As to the first point, that he was not the land agent or receiver. It is clear (indeed it has been admitted) that had the words in sect. 86 describing the person to make the demand been "the owner thereof," omitting the following words "or his known agent or receiver," the maxim *qui facit per alium facit per se*, would have applied, and a demand by anyone authorised *ad hoc* to the knowledge of the person in occupation would have been sufficient.

The argument is that the introduction into the section of the description of a particular class of agent qualifies the general principle of agency, and restricts the class of persons qualified to be appointed agents for the specified purpose to that so described. I cannot agree. I am of opinion that the words "known agent or receiver" do not limit, but, on the contrary, extend the class authorised to make the demand. Persons within this class can do so without any specific authority for so doing from the landlord or owner, just as without such authority they may cause the summons to be served, or receive the possession, if voluntarily offered, before the hearing by the Justices, or afterwards under their warrant. They are, as well put by Mr. Henry and Mr. Hynes, *quasi* principals, as if the Act contained a definition clause to the effect that "owner" in this section shall include "his known agent or receiver." To each one of these persons—the owner, his known agent, or receiver—the maxim I have referred to applies. Each of them may specially authorise any person to make the demand, provided he on whom the demand is made has notice of the authority. Mr. Monahan has argued the case with great clearness and astuteness, but the words of the section are too strong for him.

As to the second point, that the authority was not by writing, Mr. Monahan relies on the English Act (1 & 2 Vict. c. 74) which he says, and I assume truly says, was the genesis of all legislation of this class. Section 7 of that Act defines agent as "any person usually employed by the landlord in the letting of the premises or in the collection of the rent thereof, or specially authorised to act in the particular matter by writing under the hand of such landlord." Mr. Monahan reads that section as requiring, where the agent is not a known agent or receiver, that he should be specially authorised in writing by the landlord; and if the definition in that section is to be read into this 86th section of 23 & 24 Vict. c. 154, then I would agree with Mr. Monahan. To show that the definition should be so read in, Mr. Monahan has referred us to two cases: *Goldsmid* v. *Hampton* (1) and *Williams* v. *Lear* (2). These cases, however, have no application here. In each the second statute (the meaning in which of the word in controversy was ascertained by reference to the first statute) was *in pari materia* with the first. Each case is no more than an example of the general rule of construction, that where you find a word to which as it occurs in one Act of Parliament a definition has been given either by the Legislature or by judicial interpretation, and then you have another Act *in pari materia*, then the word in the second Act must be read with the meaning it has in the first. But the answer to Mr. Monahan's contention is that the Act of 1 & 2 Vict. c. 74, is not *in pari materia* with, or part of the same code, as that upon which the question here arises. It has no application to Ireland.

BARTON and WRIGHT, JJ., concurred.

Solicitor for the appellant: *P. C. P. M'Dermott.*
Solicitor for the respondent: *Henry MacDermott.*

J. G. T.

(1) 5 C. B. (N. S.) 94. (2) L. R. 7 Q. B. 285.

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1904.

FARRELL *v.* RYAN (1).

May 5, 12. *City of Dublin—Poor rate—Liability of occupier, extent of—Collection of Rates (Dublin) Act,* 1849, *s.* 74—*Local Government (Ireland) Act,* 1898 —12 *&* 13 *Vict. c.* 104, *s.* 19—*Repeal of statute.*

Though section 74 of the Collection of Rates (Dublin) Act, 1849, has not been repealed, it has ceased to be applicable to poor rate leviable in the city of Dublin, under the authority of the Local Government Act, 1898, and accordingly an occupier of premises in the city is liable for poor rates struck within two years of suit, though his occupation commenced after portion of the rate sued for had accrued.

Case Stated at the instance of the complainant for the opinion of the King's Bench Division, pursuant to 20 & 21 Vict. c. 43.

The defendant was on the 17th February, 1904, summoned before Mr. Wall, K.C., Chief Magistrate at the Metropolitan Police Court (Northern Division), by the complainant, one of the collectors of rates to the Lord Mayor, Aldermen, and Burgesses of Dublin, appointed under the Dublin Corporation Act, 1890, the Local Government (Ireland) Act, 1898, and Orders thereunder. The summons charged the defendant with not having paid the sum mentioned at foot of the summons for poor rate, or rate collectable as such, made the 28th April, 1902, in respect of the premises 19 and 20 Mary's Abbey, in the County Borough of Dublin.

The particulars were:—

	£	*s.*	*d.*
Consolidated Municipal Rate due for year ending 31st March, 1903, ...	17	13	4
Public Water Rate due for same period, . .	0	13	3
Total Municipal Rates,	18	6	7
Poor Rate, or Rate collectable as such, due for the year ending 31st March, 1903, ...	8	7	10
Total,	£26	14	5

(1) Before Palles, C.B., and Andrews, J.

There was no dispute as to the amount of the rates, which were as such assessed upon the premises 19 and 20 Mary's Abbey, for the whole year ending 31st March, 1903. At the time when the rates sued for were made the premises were occupied by John and Maria Nixon, who were duly rated for same. The defendant only entered into occupation on the 1st November, 1902. It was admitted that a demand for the rates had been made more than fourteen days before the issuing of the summons. The collector contended that section 74 of the Collection of Rates (Dublin) Act, 1849 (12 & 13 Vict. c. 91), was repealed as regards poor rates by the Local Government (Ireland) Act, 1898, and that accordingly under the Poor Relief (Ireland) Act, 1838, as amended by the Poor Relief (Ireland) Act, 1849, the defendant was liable for the whole year's rate. On the other hand it was argued for the defendant that sect. 74 of the Collection of Rates (Dublin) Act, 1849, remained unrepealed, and that the defendant was therefore only liable for the portion of the rates proportioned to the time during which she held or occupied the premises. This view was adopted by the Chief Magistrate, who issued his warrant for £7 12*s.* 10*d.* for consolidated municipal rate and public water rate, and £3 10*s.* 7*d.* for poor rate, these figures being agreed to by the parties as the proper amounts to be paid if an apportioned part only of the poor rate was recoverable.

The questions submitted for the opinion of the Court were, whether the Chief Magistrate was right in his decision, or what should be done in the premises?

Ignatius J. O'Brien, K.C. (with him *P. A. O'C. White*), for the complainant:—

Section 74 of the Collection of Rates Act only deals with rates made under that Act. But poor rate is no longer made in Dublin under the authority of that Act. Since 1898 it is collected under quite a different code.

Schedule vi., part iv., of the Local Government Act expressly repeals sects. 32 and 34 of the Act of 1849, and deletes from sect. 29 and schedules A and B the words "poor rate." Accordingly, sect. 74 of the Act of 1849 cannot govern the present poor rate in Dublin

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unless there be some enactment in the Local Government Act of 1898 making the section applicable to the rate to be struck and levied under the authority of the Act of 1898. It is submitted that sect. 66 (1) of this Act does not do so. The effect of the Act of 1898 is to abrogate the former special method of collecting poor rate in Dublin, and to introduce a new system with reference thereto, uniform throughout the country, and including the city of Dublin.

Michael J. Dunn, for the defendant:—

Section 74 is not repealed by necessary implication. The effect of such a repeal would be to impose a new burden of taxation upon Dublin ratepayers. The Court cannot hold that this was effected without clear and cogent words of the Legislature. The language of sect. 66 of the Local Government Act is inadequate for the purposes. Sect. 74 is not included in the portions of the Act expressly repealed in Schedule VI., Part IV.: *Islington Borough Council* v. *London School Board* (1).

White, in reply :—

As regards poor rate, sect. 74 of the 12 & 13 Vict. c. 91, was repealed by sect. 66 (1) of the Local Government (Ireland) Act, 1898, which assimilates the collection of the rate in Dublin to that which prevailed in the rest of Ireland. If this be so, arrears of rates made within two years of suit are recoverable from a subsequent occupier, 12 & 13 Vict. c. 104, sect. 19. At all events the way of collecting poor rate in Dublin under the Local Government Act, 1898, has been completely remodelled, and sect. 74 of the Act of 1849 is no longer applicable to poor rate, even though it may continue to exist as regards municipal rates.

May 12.

PALLES, C.B. :—

The question which arises on this case, which has been stated by the Chief Magistrate of the City of Dublin, is whether the occupier of premises within the city of Dublin is liable to pay poor rate, which has accrued due in respect of a portion of the period

(1) [1902] 2 K. B. 701 ; affirmed on appeal, [1903] 2 K. B. 355.

for which the rate was made during which another person was in occupation. Section 74 of the Collection of Rates (Dublin) Act (12 & 13 Vict. c. 91) provides that he shall not be so liable; and the question argued was, assuming that that section has not been impliedly repealed by the Local Government Act, 1898, is it applicable to poor rate made since that Act came into operation?

The learned Chief Magistrate considered that the non-liability depended solely upon the continued existence unrepealed of the above section; and as he was of opinion that it had not been repealed, he ruled that the defendant was not liable.

In holding that the section has not been repealed, the Chief Magistrate was, undoubtedly, right; and had the liability of the defendant depended upon its non-repeal, we should not have had any difficulty in affirming his decision.

However, in the argument before us the liability of defendant was placed upon a different ground. It was argued that, admitting that the section remained unrepealed (which the objects of the Local Government Act plainly required, as it was to govern other city rates), still that section applied only to rates made under the authority of the Act of 1849, and that the poor rate for the city of Dublin made since the Local Government Act was made *not* under that Act, but under a different and inconsistent code. Whether this argument is sustainable is the question for decision.

Poor rate in the city of Dublin, prior to the Local Government Act, 1898, coming into operation, was applotted, collected, and levied by the Collector-General of Rates under the authority of sections 32 and 34 of the Act of 1849. The 29th section defines the limits of the Act to be for the purposes of the collection, *inter alia*, of poor rates; and schedules A and B of the Act, in the enumeration of the rates to be collected by the Collector-General, and in the rates to be stated in the notice of demand, include poor rate. These are the only portions of the Act which relate to poor rate.

The Local Government Act expressly repeals the 32nd and 34th sections; and it further repeals the 29th section, and the schedules A and B, to the extent of striking out therefrom the words "poor rate."

Pausing here for a moment, and without referring to the new

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code enacted by the Local Government Act, it seems clear that once the repeals, effected by the later Act, took effect there could no longer be any poor rate made under the Act of 1849, and consequently, no longer any poor rate which would be within sect. 74 of that Act, unless the latter section was by some new enactment applied to the new poor rate to be made under the Act of 1898.

To determine whether that section has been so applied, we must, in the first instance, take the words of the enactment authorising the levy of the new rate. It is contained in sect. 66, subsect. 1, of the Act of 1898 :—

> "The poor rate shall be levied in the city of Dublin in like manner as in the rest of Ireland, and all enactments with respect to the making, levying, collecting, and recovering the poor rate shall apply accordingly."

These enactments thus applied to the new poor rate in the city of Dublin include sect. 71 of the first Poor Law Act, 1 & 2 Vict. c. 56, which enacts that the rate shall be paid by the person in actual occupation of the rateable property at the time of the rate made, and on his default then by the person subsequently in the occupation of the rateable property, from whom such rate shall be demanded.

Thus, before the Act of 1898, there were two distinct codes applicable to the making, levying, and recovering poor rate in Ireland. One of these codes related to the city of Dublin, the other to the rest of Ireland. The Act of 1898 then does two things: first, it expressly repeals the first code, which, consequently, ceased to exist. Were nothing else done, there would not be any code for the making, levying, or recovering poor rate in the city of Dublin; but then, secondly, it provides a substitute for that which it had repealed by expressly making applicable (by sect. 66) to poor rate in the city of Dublin the code which theretofore applied to the rest of Ireland, but not to the city of Dublin.

I deem it unnecessary to refer to others of the enactments repealed by the Act of 1898, the repeal of which supports this view, as, for instance, sect. 3 of the Poor Law Acts (Ireland) Amendment Act, 1890, the 3rd section of which excluded its application to any

poor law union within the city of Dublin. This section was repealed with the result of extending to the city of Dublin a contingent relief to prior occupiers for a proportion of the rates in respect of the time of occupation of a subsequent occupier, which would have been useless and unmeaning if the 74th section of the Act of 1849 had continued to be applicable to poor rate.

For these reasons, which are, indeed, no more than a summary of Mr. O'Brien's admirable argument, I am of opinion that the defendant is liable to pay the poor rate for the entire period in question.

ANDREWS, J., concurred.

Solicitor for the complainant: *Ignatius J. Rice.*
Solicitor for the defendant: *M. J. Hanmore.*

J. L.

O'REILLY *v.* CONNOR (1).
SAME *v.* ALLEN.

Charitable Loan Society—Loan Fund—Receiver—Renewal notes—Statute-barred debt—Consideration—Power of receiver to compromise—Charitable Loan Societies (Ireland) Act, 1900 (63 & 64 *Vict. c.* 25, *s.* 4).

A receiver, appointed to wind up a Loan Society constituted under the Loan Societies Acts, compromised claims on promissory notes due to the Society by taking a note and an I O U from debtors to the Society. The claims compromised were on foot of renewal notes which, though validated by sect. 1 of the Loan Fund Act, 1900, were irrecoverable at the time of giving the compromise note and the I O U:—

Held (reversing the decision of the King's Bench Division), that the compromises were valid, under section 4 of the Charitable Loan Societies Act, 1900 (2), and that the receiver could recover on the note and I O U in the County Court.

(1) In the King's Bench Division, before KENNY, BARTON, and WRIGHT, JJ.

(2) The Charitable Loan Societies (Ireland) Act, 1900 (63 & 64 Vict. c. 25), s. 4, provides:—"A Loan Society, acting under the principal Act, may, if

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O'Reilly *v.* Connor.

Same *v.* Allen.

Cases stated by the Right Hon. Mr. Justice Gibson on the hearing of civil bill appeals at the Summer Assizes, 1903, for the county Fermanagh. The appeal in *O'Reilly* v. *Connor* was one taken from a dismiss without prejudice, dated 23rd June, 1903, in an action for £3, the amount of a promissory note made to the plaintiff as receiver of the Pettigo Loan Fund Society. The plaintiff was, on the 27th December, 1901, appointed receiver in respect of the said Society, which had been dissolved.

The defendant's wife had made a renewal note to the said Society, dated 11th May, 1896, for £3. By way of compromise of the claim on the said note, the defendant on the 22nd December, 1902, made a note for £3 to the plaintiff, being the note sued on, and this note was accepted in discharge of all claims on the wife's note.

The plaintiff contended that the compromise was binding under section 4 of the Charitable Loan Societies (Ireland) Act, 1900, and that he was entitled to sue on the note. The defendant argued that the section did not apply, that the compromise was not binding, that the plaintiff could not sue, and that no action was maintainable.

The questions reserved by the learned Judge for the opinion of the Court were:—

(1). Is the compromise binding?

(2). Can the plaintiff enforce the same by action?

(3). Should the dismiss be reversed or affirmed?

In *O'Reilly* v. *Allen* the plaintiff had purported to compromise the claim under an old statutory note for £10 made by the defendant, by the acceptance of £1 in cash and an I O U for £8. He then sued the defendant in the County Court for the sum of £8 due as a debt evidenced by an I O U, and upon a settled account,

they think fit, accept any composition on any security, real or personal, for any debt, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever, arising under the principal Act, or this Act, and for any of those purposes may enter into, give, execute, and do, such agreements, instruments of composition or arrangement, releases, and other things, as to them seem expedient, without being responsible for any loss occasioned by any act or thing so done by them in good faith."

and the appeal was taken from a dismiss granted by the County Court Judge in the said action.

It was agreed that the determination of both cases depended upon the same considerations.

Henry, K.C., and *Pringle*, for the plaintiff.

Wylie, K.C., and *Horner*, for the defendants.

The arguments were substantially the same as those in the Court of Appeal reported *infra*, p. 612.

Cur. adv. vult.

KENNY, J.:— Nov. 23.

In those civil bill appeals, cases have been stated by Gibson, J. The same point is involved in each. The County Court Judge dismissed the processes without prejudice, and the plaintiff appealed.

The plaintiff sues as the receiver over the Pettigo Loan Fund Society, which has been dissolved, and the question is, whether it is competent under the circumstances of either case for the plaintiff to maintain his claim. I shall take the facts in the first case—*O'Reilly* v. *Connor*. On the 11th May, 1896, a promissory note, payable on demand, for £3, was given by the defendant's wife, Susan Connor, and two others, to the treasurer of the Pettigo Loan Society. It was a renewal of a former note, and no action could have been maintained on it up to the passing of the Charitable Loan Societies (Ireland) Act, 1900: *Doherty* v. *Travers* (1). On the 22nd December, 1902, the defendant alone gave a note to the plaintiff in his capacity as receiver of the Pettigo Loan Fund Society for £3. The case, as stated, finds that this note was given by way of compromise of the claim on the note of 1896, and that it was accepted in discharge of all claims on it. It was sued on by the plaintiff in his capacity as such receiver as aforesaid, and the County Court Judge dismissed the civil bill without prejudice. From that dismiss, the present appeal was brought.

I have said that no action could have been brought on the note of 1896. Furthermore, if it could have been sued on, the pro-

(1) 31 Ir. L. T. R. 67.

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ceeding should have been at Petty Sessions, and could not have been by civil bill: *Moore* v. *Donagher* (1). To deal with infirmities such as these, attaching to notes given to Loan Fund Societies governed by the Charitable Loan Societies Act of 1843, 6 & 7 Vict. c. 91, the Charitable Loan Societies (Ireland) Act, 1900, 63 & 64 Vict. c. 25, was passed. It provided by section 1 that any note current or unpaid on the 1st March, 1899, and made under the Act of 1843, should not be invalid or incapable of being enforced by reason of (amongst other matters) the said note having been given as a renewal. The result of this section was to give validity to these existing current or unpaid renewals, so far as their infirmity rested on their being renewals; but it did not purport to validate future renewals which, being subject to the provisions of the Act of 1843, could not be sued on. Furthermore, as to these unpaid or current renewals, it has been decided that, though the Act of 1900 validates them, any proceeding on foot of them in the only tribunal that has power to deal with them—namely, Petty Sessions—must be brought within six months from the time when the cause of complaint arose, inasmuch as they are subject to the provisions of sect. 10 of the Petty Sessions (Ireland) Act, 1851: *Atthill* v. *Woods* (2). There can be no question therefore that, so far as the note of 1896 is concerned, no proceeding whatever could have been brought on foot of it in December, 1902, when the defendant's note was given, and that for all practical purposes it was then dead. It will be observed that the new note of 22nd December, 1902, is not in the form prescribed by the Act of 1843, neither is it made to an officer of the Society. It is on a stamp—in this respect also differing from notes purporting to be given in pursuance of the Act of 1843. In no respect indeed can it be said to be a note within that Act—which does not confer any powers on a receiver of a dissolved Loan Society to take notes from borrowers. His duty is to get in the assets, which, under sect. 45, vest in the secretary for the time being of the Loan Fund Board.

The plaintiff's contention in these circumstances is that this note is the result of a compromise under the 4th section of the Act of 1900, and that it was open to the plaintiff to take it in any form he chose, and that it is outside the category of notes bound

(1) [1903] 2 I. R. 290. (2) *Ibid.* 305.

by the provisions of the Act of 1843. He further says that in his capacity as receiver he, without any authority from the Act of 1900, was entitled to take a security for a debt due to the dissolved Society, which security would not be subject to the Act of 1843. The 4th section of the Act of 1900 is as follows:—[His Lordship read the section, *ante*, p. 601]. This power is conferred on the Loan Society alone; and unless a receiver has all the powers of the dissolved Society conferred on him, I am of opinion that he cannot be brought within the scope of the section. By the 45th section of the Act of 1843 he is to have all the powers vested in the treasurer, trustees, or other officer or officers of such Society, under their rules, or under the Act, or otherwise. His duties are pointed out by the same section. They are limited to calling in and receiving all outstanding debts and demands, and instituting the necessary proceedings for that purpose. It was never contemplated that he was to take renewals—a thing that the Society, as a going concern, could not have done. Whatever additional powers are conferred by this 4th section, it seems to me they are applicable to the Society before dissolution, and are in no way applicable to the receiver of a dissolved Society.

But the plaintiff contends that, apart from the 4th section, he was entitled to take this note by way of settlement or compromise —that value has been given for it (*Haigh* v. *Brooks* (1)) in the shape of abandonment of assumed rights against the makers of the note of 1896, and that the transaction is a new one, and altogether outside the Act of 1843. I cannot accede to this argument. The note of 1896 could not have been utilised for any purpose when the note of 1902 was given. No action could have been maintained on it against any of the parties to it, and the giving by defendant of a new note was not the compromise or abandonment of a doubtful right. There were no rights to abandon, for none existed. I therefore think there was no consideration for the note of 1902. Furthermore, the latter is made to the plaintiff in his capacity as receiver; he sues as such receiver: and if the money were recovered, it would be assets of the dissolved Society. If a receiver were at liberty to compromise in this manner, I can see nothing to prevent the trustees, secretary,

(1) 10 Ad. & Ell. 309.

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or treasurer of a going Society doing so likewise. If these officers could do so, renewals could be taken for debts, and in a form not prescribed by the Act of 1843; and in order to recover on them, they could be called "compromises." This would be a clear evasion of the statute, to which, in my opinion, we should not give our sanction.

The facts of the second case of *O'Reilly* v. *Allen* are somewhat different; but the arguments applicable to both are identical, and the ruling in one case will govern the other.

The first two questions put in each case will be answered in the negative, and the dismisses will be affirmed.

Barton, J.:—

Mr. Justice Gibson has stated a case for our opinion, and the two questions of law which he has put to us are these—(1) Were these "compromises" binding? and (2), Can plaintiff enforce them by action? In my opinion, both these questions should be answered by us in the negative. It seems to me that these compromises involved the taking of securities which were not in the form prescribed by section 25 of the Act of 1843, and that plaintiff's claim is one which, under section 30 of that Act, is not enforceable by action in the County Court, but only by complaint at Petty Sessions.

In Connor's case, the Pettigo Loan Society having been dissolved in the year 1901, the Loan Fund Board, in December, 1901, in pursuance of section 45 of the Act of 1843, appointed Edward O'Reilly, the plaintiff in these actions, to be receiver over the Society. Among the securities which came into his possession as such receiver was a note for £3 from a Mrs. Mary Connor. It was an old renewal note given, on May 11th 1896, in respect of a charitable loan to the then treasurer of the Loan Society, and was in the form prescribed by section 25, and Schedule A of the Act of 1843. It appears that, for more reasons than one, it was an unenforceable security at the date of the passing of the Act of 1900; but it received, by sect. 1 of that Act, a fresh lease of life—at all events, for six months from July 30th, 1900. It appears to be admitted that from that date it became again unenforceable.

In *Atthill* v. *Woods* (1) the King's Bench Division, in November, 1902, decided that the Petty Sessions Statute of Limitations (14 & 15 Vict. c. 93, s. 10 (4)) applied to these statutory loan fund securities, and that proceedings must be brought upon them within six months from the time when the cause of complaint arose. That decision followed naturally upon the decision in *Moore* v. *Donagher* (2), where it was held that the sole remedy for the recovery of the amount of statutory promissory notes made under the Charitable Loan Societies Act, 1843, is by complaint in the Petty Sessions Court.

The receiver, on the 22nd December, 1902 (*i.e.* in the month following the decision in *Atthill* v. *Woods* (1)), compromised Mary Connor's unenforceable note by accepting a promissory note of that date, not in the prescribed statutory form, from her husband, Pat Connor, for the same amount. This note was an ordinary stamped promissory note in the common form. The consideration for this note appears to have been the forbearance to sue Mary Connor upon the statute-barred note, and the release of all claims on foot of that note, Pat Connor's note being accepted in full discharge of all claims of the Loan Society on foot of Mary Connor's note. The receiver then proceeded to sue Pat Connor in the County Court upon the note of the 22nd December, 1902. In other words, he sued Connor upon a security not in the form prescribed by statute, and in a Court which is not the Court fixed by statute for such proceedings.

Plaintiff's counsel contended that these compromises, although they may have been unauthorised by previous Charitable Loan Societies Acts, were rendered binding by section 4 of the recent Act of 1900. I do not feel at liberty to give to that section so wide an interpretation. It seems to me to be in the nature of a mere "trustee relief" section, borrowed almost verbatim from section 21 of the Trustee Act, 1893. A perusal of the words of section 4 of the Act of 1900 shows that it has been borrowed, with two slight modifications, from section 21 of the Trustee Act, 1893, which was a re-enactment of section 37 of the Conveyancing Act, 1887, which replaced section 30 of Lord Cranworth's Act. I dare say that it was thought necessary to introduce that section,

(1) [1903] 2 I. R. 305. (2) *Ibid* 290.

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and make it expressly applicable to Loan Fund Societies, because it has been held that the trustees of Loan Fund Societies, although trustees in name, are not quite in the same position as trustees under a will or deed for whom section 21 of the Trustee Act, 1893, was intended. Section 4 of the Act of 1900 made it clear that the trustees of Loan Fund Societies have the protection which other trustees enjoy under section 21 of the Trustee Act, 1893, and that, like ordinary trustees, they may compromise or compound debts or claims due to the Society "without being personally responsible for any loss occasioned by anything done by them in good faith." But I find it difficult to suppose that a section which has such a parentage was intended to enable Loan Societies to enter into compromises of charitable loans which would be contrary to unrepealed provisions of the Charitable Loan Societies Acts. In other words, section 4 of the Act of 1900 does not, in my opinion, legalise unlawful compromises, which are inconsistent with or forbidden by unrepealed provisions of previous statutes.

I may add that I do not think sect. 4 applies to a receiver at all. The opening words of the section are "A Loan Society acting under the principal Acts may, if they think fit," &c. When a receiver is appointed under sect. 45 of the Act of 1843, the Loan Society has been dissolved. The receiver is not responsible to the members or to the debenture-holders of the dissolved Society. His responsibility is to the Loan Fund Board, whose officer he is. Everything in the nature of a quasi trust—in so far as there was ever anything of the kind—has been put an end to. The receiver does not require anything in the nature of a trustee relief section. Such a section is inapplicable to the nature of his office and of his obligations. Without the aid of sect. 4, the receiver can, I presume, compromise claims with the approval of the Loan Fund Board; but such compromises must, in my opinion, be not inconsistent with or forbidden by the provisions of the statutes under which he derives his authority.

Another argument of Mr. Pringle's, with reference to section 4 of the Act of 1900, deserves to be noticed. He contended that section 4 of the Act of 1900 can have no meaning unless it be held to authorise the compromise of charitable loans in ways which were not previously authorised: and the words

"real security" and "arbitration" and other expressions were referred to as having no meaning in connexion with the ordinary procedure for the making and recovery of charitable loans, and as indicating an intention to widen that procedure. I cannot accede to this view. The section applies to other transactions and dealings of Loan Societies, and not solely or principally to debts in respect of charitable loans. It must be remembered that the trustees of Loan Societies have many transactions besides charitable loans. They may own property, and may issue debentures charged upon all their property. They may sue and be sued in any Court at law or in Equity. The exclusive jurisdiction of the Petty Sessions Court applies to the recovery of charitable loans, and also of forfeitures and penalties, but not to the ordinary affairs of the Society. I have known several suits in the Superior Courts brought by or against Loan Societies in the name of their trustees. In an action of that kind a judgment obtained by the Society might be registered against the lands of a judgment debtor and be described as a "real security." It might be very expedient to refer a suit to arbitration, or to compound a real security, instead of proceeding to sale or eviction. It seems to me that a coherent and consistent meaning can be given to the provisions of sect. 4, without supposing that it was intended to authorise a treasurer of a loan society, still less a receiver of a dissolved Society, to make arrangements or bring actions in respect of charitable loans otherwise than as provided by the Charitable Loan Statutes.

Having disposed of sect. 4, I come next to Mr. Henry's argument that this compromise can be supported at Common Law upon the authority of *Haigh* v. *Brooks* (1). Mr. Henry argued that this was an enforceable compromise at Common Law, because forbearance to sue upon a statute-barred debt, or upon a *bona fide* claim, even although it be a doubtful claim in point of law or fact, may afford good consideration for a promissory note given by a third party. If this were an ordinary commercial transaction not regulated by the provisions of the Loan Fund Statutes, there would be a great force in Mr. Henry's argument. I do not rest my judgment upon the fact that Mary Connor's note was barred by

(1) 10 Ad. & Ell. 309.

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the Statute of Limitations, and I am willing to assume that, if this were an ordinary transaction regulated solely by the Common Law, plaintiff would be entitled to a decree. However, I do not find it necessary to decide that point, or to discuss that argument, because the answer to it seems to me to be that we are not concerned in this case with an ordinary commercial transaction governed by the general provisions of the Common Law, but with a very special kind of charitable loan transaction which is not merely governed by, but is, if I may say so, "cabined, cribbed, and confined" by, several very strict statutory restrictions, and by several legal decisions which have given to those strict provisions a strict interpretation.

The receiver in this case was not contracting or suing in his personal capacity. In that capacity he would be at liberty to contract in any form permissible at Common Law, and to sue in all the Courts. Even in his official capacity as receiver he might enter into arrangements and sue in the County or Superior Courts in respect of the general property and the general affairs of the Society in so far as the former trustees and officers of the Society had power so to do. But this was a charitable loan transaction. The Act of 1843 by sect. 25 conferred upon the officers of the Society a strictly limited contractual capacity as regards the form of security to be taken for the repayment of a charitable loan, and by section 30 prescribed an exclusive remedy for the recovery of the loan, namely, a complaint in the Petty Sessions Court. The receiver purported to enter into this promissory note in his official capacity, and he sues in his official capacity upon it in the County Court. He sues, not for his own benefit or at his own risk, but for the benefit and at the risk of the estate of the Loan Society which he is winding up under his statutory powers and duty. The money, if recovered, will not go into his own pocket. He contracted in this case and he sued in this case in a character in which he is the mere creature of a statute, which in respect of the securities to be taken for the repayment of a charitable loan only recognises one form of security, and in respect of the recovery of such loans only recognises one exclusive *forum*, namely, the Petty Sessions Court.

The receiver's powers are conferred upon him by s. 45 of the Act

of 1843. That section gave him the powers of the treasurer; and the powers of the treasurer in respect of taking securities for the repayment of charitable loans were limited to taking a security in the statutory form, and suing in the prescribed Court. In my opinion the treasurer could not, in his official capacity, have evaded all the restrictions of the Loan Fund Acts by substituting an ordinary promissory note made by a husband for a statutory promissory note made by a wife. A proceeding of this kind seems to me to conflict with the provisions of the Act of 1843, and especially with sects. 24, 25, and 30 of that Act. It would be strange, indeed, if all the provisions of the Act of 1843, which were inserted for the protection of these borrowers belonging to the "industrious classes," as they are called in the statute, could be evaded and nullified by the simple expedient of substituting an ordinary note made by one "industrious" peasant for a statutory note made by another, and suing the substituted "industrious" peasant in the County Court.

If the treasurer of a Society could not have entered into a contract of this kind, where does the receiver get his authority to do so? His duty is, not to lend to, or to take securities from, borrowers, but to wind up. For that purpose he may, with the sanction of the Loan Fund Board, enter into all compromises, which are not contrary to, or forbidden by, the statutes under which he derives his authority. But he cannot, in my opinion, create, in his official capacity, a valid security of this kind in respect of a charitable loan, or sue in respect of it in the County Court.

In Allen's case the facts are different; but some of the same considerations apply to Allen's case. It appears that the receiver had an old statutory note for £10 in which Allen was promisor. The receiver, after accepting £1 in cash from Allen, purported to compromise this note by forgiving Allen £1 and taking an I O U for £8. He then sued Allen in the County Court for £8 as a debt evidenced by an I O U, and upon a settled and stated account. In my opinion the receiver cannot maintain this action in the County Court. I cannot reconcile a proceeding of this kind with the concluding words of sect. 25, or with the provisions of sect. 30 of the Act of 1843. The receiver may compromise a debt in respect of a charitable loan, but he cannot do so by methods inconsistent with

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the provisions of the Charitable Loan Societies Acts. In my opinion, it is not permissible for a treasurer, or for a receiver of a Charitable Loan Society, to evade all the restrictions of the Acts of 1843 and 1900, and to transfer a charitable loan from the jurisdiction of the Petty Sessions Court to that of the County Court by the simple device of substituting for a promissory note in the statutory form a debt for a smaller amount, evidenced by an I O U.

Accordingly, without finding it necessary to express any opinion upon the argument which Mr. Henry based upon the case of *Haigh* v. *Brooks* (1), I hold that having regard to the special provisions of the Charitable Loan Societies Acts, and having regard to the decisions upon these Acts by which we are bound, these "compromises" were not enforceable, and these actions by civil bill were not maintainable.

These cases illustrate the difficulties which trustees and receivers of Loan Societies may be placed in, in realising the debts due to these Societies. The result may be that in some cases borrowers escape liability for debts which they ought to be made to pay, and debenture-holders and others lose the security for their small invested capital. These, however, are considerations not for us, but for the Legislature. In my opinion, having regard to the combined effect of the statutes and of the authorities, we must hold that these dismisses ought to be affirmed.

WRIGHT, J., concurred.

R ST. J. C.

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The plaintiff appealed (2).

Henry, K.C., and *Pringle*, for the appellant :—

A statute-barred note is a good consideration for a renewal, *Flight* v. *Reed* (3); *Haigh* v. *Brooks* (1). Even though the notes were irrecoverable at the time of the compromise, s. 4 of the Charitable Loan Societies Act of 1900 validates the compromise, and the receiver is entitled to recover.

(1) 10 Ad. & Ell. 323.

(2) In the Court of Appeal, before FITZ GIBBON, WALKER, and HOLMES, L.JJ.

(3) 1 H. & C. 703.

Wylie, K.C., and *Horner*, for the respondents:—

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There was no consideration for the note sued on, or the I O U, inasmuch as the notes for which they were given could not have been sued on, and the debts were then irrecoverable, *Rex* v. *Justices of Fermanagh* (1); *Moore* v. *Donagher* (2). A note given to secure a loan pursuant to s. 25 of the Act of 1843 cannot be the subject of a compromise. Moreover, a receiver appointed to wind up a Loan Society under the Act of 1843 cannot take advantage of the authority to settle in the Act of 1900.

FITZ GIBBON, L.J.:—

Feb. 8.

These two cases have been stated upon appeals from dismisses of civil bills brought by the receiver of the Pettigo Loan Fund Society against alleged debtors.

The appeals came before Gibson, J., at the Fermanagh Summer Assizes, 1903; he was told that the cases would rule many others; each party asked him to state a Special Case, and he complied, but gave no opinion upon the questions at issue.

In the King's Bench Division, Kenny and Barton, JJ., delivered judgments substantially the same, affirming the dismisses. The receiver has appealed, and the matter is important, because if the decision below be right, no claim of a Loan Fund Society can safely be compromised by a receiver, and the Societies will be debarred almost in every case from compromising claims.

The facts in the two cases differ slightly. The defendant Allen was an original debtor of the Society on a note in statutory form with two sureties for £10, the date of which is not stated, but which was represented by a renewal note for £10, dated January 11, 1897. In Connor's case, his wife was similarly indebted upon a renewal note for £3, dated 11th May, 1896. In both cases, the renewal notes were unpaid on March 4, 1899, and purporting to have been made in pursuance of the provisions of the Charitable Loan Societies (Ireland) Act, 1843, they came within the Charitable Loan Societies (Ireland) Act, 1900, section 1. But for that Act, the debts were irrecoverable under decided cases, as being

(1) [1904] 2 I. R. 18. (2) [1903] 2 I. R. 290.

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secured by notes illegally given as renewals. They also were irrecoverable under the decisions that, under the Act of 1843, Loan Societies can sue only at Petty Sessions, and only within six months after the accrual of the debt.

On the Special Case, the fact of renewal is the only ground stated for imputing invalidity to the notes; but the bar, by way of limitation to the right of suit, appears upon the dates.

The Pettigo Loan Fund Society was dissolved, and on December 27, 1901, the plaintiff was appointed receiver by the Loan Fund Board under the Act of 1843, section 45. The receiver on January, 1, 1902, compromised the claim against Allen by accepting £1 in cash, forgiving £1, and taking an I O U for £8, described as "balance now due on my debt due the above Society on promissory notes, dated January 11, 1897, for £10, and on which £1 has been paid." On December 22, 1902, the receiver compromised the claim against Mrs. Connor and her sureties by taking an ordinary stamped note, payable on demand, for £3, from her husband, the defendant Pat Connor. The Civil Bills are brought upon the I O U and note thus taken.

The questions for the opinion of the Court on each case are :— (1.) Is the compromise binding? (2.) Can the plaintiff enforce the same by action? (3.) Should the dismiss be reversed or affirmed?

The Act of 1900 provides that any promissory note to which it applies shall not be invalid or incapable of being enforced in any Court by reason of (*inter alia*) "the said note having been given as a renewal." Accordingly, in these cases the debts were on March 1, 1899, rendered as valid and as capable of being enforced as if the notes by which they were secured had not been renewals, but were original notes. But the statute does not expressly extend or revive any right of suit upon them; and even if a new start for six months was given by the passing of the Act of 1900, that period elapsed before the compromises, and we must, therefore, take the debts to have been then "statute-barred," *i.e.* the debt was still there, but the remedy was gone.

The general rule, under such circumstances, is thus stated in Byles on Bills, ed. 1870, p. 127 :—

"The compromise of a claim, though really unfounded, and believed to be so by the party against whom it is made, may be a good consideration for a promissory note (*Cooke* v. *Wright*, 30 L. J. Q. B. 321).

"A moral obligation is in general insufficient, but may in some cases be a consideration for a bill or note, as where there once existed a legal liability, though it may have been barred by statute. *Quisque renunciare potest juri pro se introducto.*"

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As examples, a note by a bankrupt to one of his creditors for part of his debt was held to be given on a good consideration, and a note for purchase-money of land, though the contract to purchase was void under the Statute of Frauds, was held made on sufficient consideration. In *Flight* v. *Reed* (1) a bill given after the repeal of the Usury Laws to repay a debt with usurious interest contracted during the existence of those laws was held binding. The law is the same where a contract is made between a creditor and debtor, as in Allen's case, and where, as in Connor's case, a third party comes in upon consideration moving from the creditor to the debtor. Therefore, unless some defence can be shown under the Loan Societies Acts, these compromises are binding.

Kenny and Barton, JJ., held them to be *ultra vires* and illegal under the Act of 1843; they might have been so, if made under that Act; but neither in form nor in substance did they purport to be so made; they were made under the Act of 1900, section 4. [The Lord Justice read the section, *ante*, pp. 601, 602.]

This is an independent section, though it applies to a Loan Society acting under the principal Act: every power which it confers is new; some of these powers, *e.g.* submitting to arbitration, and executing instruments of arrangement, are inconsistent with the rigid provisions of the principal Act. The powers are conferred in the widest possible terms; and in substance and method, they go as far as possible.

These compromises are of the most usual and ordinary kind, and the statutory power of settlement extends to any claim or thing whatever, and for that purpose to the doing of any thing whatever, as to the Society seems expedient. It would be absurd to hold that the section relieved the Society from responsibility for loss occasioned by any act or thing which it did not enable them

(1) 1 H. & C. 708.

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to do. The effect of section 4 must be the same as if on July 30, 1900, it had been inserted *totidem verbis* in the principal Act.

If these compromises had been made by the Loan Society, I think it clear that they would have been within the powers conferred by the Act of 1900, section 4; and if so, they cannot be treated as illegal evasions of the Act of 1843.

Kenny, J., seems to have thought that the note of Pat Connor could not be sued upon. First, because the powers conferred by section 4 were applicable to the Society before dissolution, and were in no way applicable to the receiver of a dissolved society. Secondly, because the giving by the defendant of a new note was not the compromise or abandonment of a doubtful right, and there were no rights to abandon, for none existed. He adds:—"If a receiver were at liberty to compromise in this manner, I can see nothing to prevent the trustees, secretary, or treasurer, of a going Society doing so in like manner; if these officers could do so, renewals could be taken for debts, and in a form not prescribed by the Act of 1843, and in order to recover on them, they could be called compromises: this would be a clear evasion of the statute to which, in my opinion, we should not give our sanction."

Barton, J., carries this argument to the point of holding the compromises illegal. He says:—"We are not concerned in this case with an ordinary commercial transaction governed by the general provisions of the common law, but with a very special kind of charitable loan transaction which is not merely governed by, but is 'cabined, cribbed, and confined' by, several very strict statutory restrictions, and by several legal decisions which have given to those strict provisions a strict interpretation." "The receiver may compromise a debt in respect of a charitable loan, but he cannot do so by methods inconsistent with the provisions of the Charitable Loan Societies Acts."

With all respect, this is wiping out the Act of 1900, sect. 4, altogether: none of the acts which it empowers a Loan Society to do could be done by any method consistent with the "strict provisions" or "strict interpretation" of the Act of 1843.

The contention that the new powers are given only to an undissolved Society, and not to a receiver, is inconsistent with the Act of 1843, section 45, under which the receiver is appointed.

Every act of an undissolved Society must be done—not by itself as a corporation, which it is not—but by, or in the name of, the treasurer, trustees, secretary, or some other officer enabled to act for it. Section 45 directs the Loan Fund Board, on dissolving any Society, to—

> "Cause the affairs of such Society to be wound up, and for that purpose appoint a fit and proper person to call in and receive all outstanding debts and demands due or payable to or on account of such Society, and to institute and carry on, either in his own name or in the name of the secretary of the Loan Fund Board, or of the treasurer, trustees, or other officer or officers, of such Society, the necessary proceedings for that purpose, and such person shall have all the powers vested in the said treasurer, trustees, or other officer or officers of such Society, under their rules or this Act, or otherwise; and after the appointment of such receiver as aforesaid it shall not be lawful for such Society, or the treasurer, trustees, or other officer or officers thereof, unless authorised in that behalf by such receiver, to receive, sue for, or recover any loan, debt, or demand due or payable to or for the use of such Society."

This section clearly conferred upon the receiver of a dissolved Society the powers which the Act of 1900, section 4, gave to the Society; and it forbade the Society and its officers, on dissolution, to execute any power, unless authorised in that behalf by the receiver.

The order of the King's Bench Division must be discharged: questions 1 and 2 must be answered in the affirmative; the answer to No. 3 will be that the dismiss pronounced by the County Court Judge be reversed; the cases will be remitted, with our order, to Gibson, J., that he may give the proper decrees.

The special cases make no provision as to costs; the order of the King's Bench Division giving costs to the defendants must be discharged; but, having regard to the fact that these are test cases, we make no order as to the costs in the High Court or here. The decrees to be given by Gibson, J., will carry the right to the usual costs under the Civil Bill Acts.

WALKER, L.J., concurred.

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HOLMES, L.J. :—

The Charitable Loan Societies (Ireland) Act, 1843, section 25, prescribes the form of the notes or securities to be taken for the repayment of loans made by a Loan Society established under the provisions of the Act, and enacts that no proceedings shall be had for the recovery of any such loan save where the note or securities therefor shall be in the form and on the paper supplied by the Loan Fund Board. Section 30 provides a mode of procedure before a Justice of the Peace, or at Petty Sessions, for the recovery of the sums so secured, and it has been held that this is the only remedy by which repayment of a loan can be enforced; *Moore* v. *Donagher* (1).

It has also been held, first in the Divisional Court, *Atthill* v. *Woods* (2), and afterwards in this Court, *The King* (*O'Reilly*) v. *Justices of Fermanagh* (3), that the proceedings prescribed by section 30 must be brought within six months from the time when the cause of action arose. In consequence of carelessness and irregularity in the management of Loan Societies, many of the notes held by them were invalid; and the Charitable Loan Societies (Ireland) Act, 1900, was passed to cure some of their defects, and to amend, in one or two particulars, the statute of 1843. Amongst the invalid notes so cured were two given to the treasurer of the Pettigo Loan Fund, one dated the 11th May, 1896, from Susan Connor and two sureties for £3, and the other, dated the 11th January, 1897, from William Allen and two sureties for £10; and under the Act of 1900, as it has been judicially interpreted, proceedings for the recovery of the amounts thus secured might have been taken before a Justice of the Peace, or at Petty Sessions, within six months after the 30th July, 1900. This period was allowed to pass without anything having been done in respect of either note, but towards the end of 1901 the appellant who was then acting as receiver over the Pettigo Loan Fund Society caused a summons to be issued under the 30th section against Allen on his note; and before it was served, Allen, by way of compromise, on the 1st January, 1902, paid £1 in cash and gave an I O U for £8 in discharge of £10, the amount of the

(1) [1903] 2 I. R. 290. (2) *Ibid.* 305. (3) [1904] 2 I. R. 18.

note. No summons was issued against Susan Connor; but it must be assumed that a demand for payment of her note was made, and her husband on the 22nd December, 1902, gave to the receiver, by way of compromise, his own promissory note for £3, drawn in the usual mercantile form, and duly stamped. Subsequently the receiver sued in the Civil Bill Court Allen on his I O U and Connor on his promissory note; and when these proceedings were dismissed by the County Court Judge, he appealed to the Judge of Assize, who stated the two cases now under consideration.

The defendants rely on three defences. First, it is said that there was no consideration for the I O U or the promissory note, inasmuch as the original notes could not have been sued on. I have always understood that the abandonment of actual or threatened litigation to enforce a claim is sufficient consideration for a compromise, provided that the claim is made in good faith. It would be novel and dangerous to hold that the validity of such a compromise depends on whether there was a cause of action. It is an everyday occurrence for a person who is advised that he has a legal defence to a demand to make an arrangement with his adversary. Doubtless, if it could be shown that the threat of a lawsuit was used as a means of levying blackmail, a settlement of it entered into without advice might be set aside; but no question of this kind arises here. Allen gave his I O U long before *Atthill* v. *Woods* (1) was heard; and although Connor's promissory note was made after that case, the appellant at the time he received it was taking steps to have the decision of the King's Bench Division reconsidered on appeal in *The King* (*O'Reilly*) v. *The Justices of Fermanagh* (2).

The second point contended for by the respondent is, that a note given to secure a loan pursuant to the 25th section of the Act of 1843 cannot be the subject of settlement or compromise. This might have been argued before the statute of 1900 became law; but its 4th section enables a Loan Society to accept any composition on any security for any debt, to allow time for payment, and to compromise, compound, abandon, submit to

(1) [1903] 2 I. R. 305. (2) [1904] 2 I. R. 18.

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arbitration, or otherwise settle any debt, account, or claim. This provision—than which it would be difficult to imagine language more comprehensive—must now be read as part of the Act of 1843; and it follows that a compromise, or settlement, made under the power thus conferred is enforceable by appropriate legal methods, including process in the Civil Bill Court.

The last matter argued by Mr. Wylie is that the Pettigo Loan Fund Society, having been dissolved under the 45th section of the Act of 1843, a receiver appointed, as the appellant has been, to wind up its affairs, cannot take advantage of this authority to settle. But a receiver is given in express terms "all the powers vested in the treasurer, trustees, or other officers of the Society"—words which necessarily include every power that can be exercised by, or on behalf of, the Society itself. A careful study of the Act shows that the Loan Societies established pursuant thereto can only act through their officers. Therefore, the compromise of a debt must be arranged by the treasurer, trustees, committee, or other officers, if the Society is carrying on operations; and after its dissolution, by the receiver.

For these reasons, I am of opinion that the appeal ought to be allowed.

Solicitors for the plaintiff: *Falls & Pringle.*
Solicitor for the defendants: *L. R. Lipsett.*

R. D. M.

IN THE MATTER OF THE FINANCE ACTS, 1894 AND 1896, AND JAMES FITZGERALD LOMBARD (1).

K. B. Div. 1904.

May 13, 14. June 20.

Revenue—Estate duty—Deduction—Marriage settlement—Bonâ fide *purchase —Partial consideration in money or money's worth—Succession Duty Act*, 1853, *s.* 17—*Finance Act*, 1894, *s.* 3 (1), (2).

By a settlement on the marriage of L. and D., L., the husband, in consideration, partly of the transfer to him by D., the wife, of 600 Grand Canal shares and partly of the marriage, granted certain lands in trust for himself for life, and after his death for D. absolutely. Upon L.'s death the lands, portion of which had in the meantime been sold, were represented by £8119 4*s*. The Commissioners of Inland Revenue claimed estate duty upon the full sum of £8119 4*s*. as being the principal value of the property passing to D. upon the death of L., ascertained in accordance with the provisions of the Finance Act, 1894. They disputed D.'s right to a deduction of £6600, being the value at the date of the settlement of the consideration in Grand Canal shares, upon the ground that the transaction embodied in the settlement was not one in which the £8119 4*s*., the value of the land, was to pass to her upon the death of L., by reason only of a *bonâ fide* purchase from him for partial consideration in money or money's worth, within the meaning of section 3 (2) of the Act:—

Held, that the expression "partial consideration in money or money's worth," in section 3 (2), was intended to relate to contracts in which the consideration was partly money or money's worth and partly marriage, and that the sum in respect of which D. was liable to pay estate duty was to be ascertained by deducting £6600, the value of the consideration in money or money's worth, from £8119 4*s*., the value of the property passing to her under the settlement upon the death of L.

PETITION on behalf of Sarah A. Lombard, widow of James Fitzgerald Lombard, of South Hill, Upper Rathmines, Dublin, to have it declared that the value of 600 ordinary shares in the Grand Canal Company should, for the purposes of estate duty, be allowed as a deduction from the value of certain property passing to her under an indenture of marriage settlement, dated the 12th September, 1896, on the death of her husband, James Fitzgerald

(1) Before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

K. B. Div. 1904. *In re* LOMBARD.

Lombard. By the indenture in question the late James Fitzgerald Lombard, upon his marriage with the petitioner, in consideration of the marriage, and of the transfer to him of the 600 Grand Canal shares by the petitioner, then Sarah A. Dunne, granted and conveyed to himself and to the petitioner the lands of Clonturk, to hold portion of the said lands to himself and the petitioner, their executors, administrators, and assigns, for the residue of a term of years then subsisting in them upon certain trusts therein declared, and to hold the residue of the said lands unto and to the use of himself and the petitioner, their heirs and assigns, as joint tenants upon certain trusts therein declared. The trusts were that James Fitzgerald Lombard and the petitioner should, after the solemnization of their marriage, hold the first-mentioned lands upon trust for James Fitzgerald Lombard during his life, if the term of years should so long last, without impeachment of waste, and from and after his death, upon trust for the petitioner, her executors, administrators, and assigns, absolutely, and should hold the second set of lands also upon trust for James Fitzgerald Lombard, during his life, without impeachment of waste, and from and after his death upon trust for the petitioner, her heirs and assigns, for ever. The marriage was solemnized shortly after the execution of the indenture. All the lands of Clonturk, with the exception of a portion known as St. Mell's Terrace, were subsequently sold by James Fitzgerald Lombard and the petitioner, and the proceeds of the sale were invested in the purchase of 1206 preference shares in Clery & Co., Limited, Sackville-st., Dublin. James Fitzgerald Lombard died on the 23rd September, 1901. After his death a claim was made by the Commissioners of Inland Revenue for payment by the petitioner of estate duty on the 1206 preference shares in Clery & Co., Limited, and on St. Mell's Terrace. In the account which was passed, the preference shares in Clery & Co., Limited, were valued at £6030, and St. Mell's Terrace at £2089 4*s.*, making in all £8119 4*s.*, and the amount of estate duty claimed was £405 19*s.* 2*d.*, together with £19 3*s.* 8*d.* interest.

The petitioner's solicitors, when passing the account, claimed that the value of the 600 ordinary shares in the Grand Canal Company, part consideration for the conveyance of the lands of Clonturk, should be deducted from the value of the property

charged with duty. The value of the Grand Canal shares, as at the date of the indenture of the 12th September, 1896, was £6637 10*s*. The Commissioners refused to allow any such deduction, and, after considerable correspondence, the petitioner's solicitors delivered on the 12th January, 1904, a statement of her grounds of appeal against the refusal of the Commissioners to allow the deduction. The grounds were as follows:—"1. The appellant contends that the decision or claim of the Commissioners is erroneous, inasmuch as no deduction from the value of the property charged with duty is allowed for the value of 600 ordinary shares in the Grand Canal Company, which were part consideration for the transfer of the said property made by the said indenture. 2. The appellant contends that she is entitled to the deduction aforesaid under the provisions of sect. 3, sub-sect. 2, of the Finance Act, 1894, inasmuch as the property charged with duty passed to her by reason only of the *bonâ fide* purchase by her of same, partly in consideration of marriage and partly in consideration of the transfer of the said 600 shares by her to the deceased for his own use. 3. Alternatively the appellant contends that by the transfer of the said 600 shares to the deceased for his own use, she purchased the property charged with duty to the extent of the value of the said shares, and that she was the disposer of the said property in the said indenture to the said extent, and that such property to such extent as aforesaid is exempt from estate duty by sect. 15, sub-sect. 1, of the Finance Act, 1896. 4. The value of the said shares at the date of the said purchase was £6600, and deducting same from the value of the said property charged, viz., £8119 4*s*., the principal value of the property chargeable as at the date of the death of the deceased would be £1519 4*s*. The duty on the said £1519 4*s*. at five per cent. would be £75 19*s*. 3*d*., and this sum, together with the sum of £4 13*s*. 6*d*. (interest thereon at three per cent., from the 23rd September, 1901, to the present date), making in all the sum of £80 12*s*. 9*d*., the appellant admits to be due, and hereby tenders in satisfaction of the claim herein."

On the 11th February, 1904, the Commissioners through their solicitor notified in writing to the petitioner's solicitors that they had determined to maintain their decision, and stated

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their grounds as follows:—"1. That the property passing on the death of James Fitzgerald Lombard, deceased, is subject, under the provisions of the Finance Act, 1894, sect. 1, to the payment of estate duty on the principal value thereof ascertained under the provisions of the Act. 2. That the appellant is not entitled to be allowed any deduction from the value of the property for the value of the 600 ordinary Grand Canal Company shares, inasmuch as the property did not pass to her on the death of James Fitzgerald Lombard by reason only of a *bonâ fide* purchase from the said James Fitzgerald Lombard, the person under whose disposition the property passed for full consideration in money or money's worth paid to James Fitzgerald Lombard for his own use or benefit, as required by the provisions of sect. 3 (1) of the Finance Act, 1894, in order to entitle the appellant to make such deduction. 3. That the appellant is not entitled to be allowed any deduction from the value of the property for the value of the Grand Canal shares, inasmuch as the property did not pass to her on the death of James Fitzgerald Lombard, deceased, by reason only of a *bonâ fide* purchase from him for partial consideration in money or money's worth paid to him for his own use or benefit, as required by the provisions of section 3 (2) of the Act, to entitle the appellant to make the deduction; and 4, That the appellant was not a disposer of the property alleged in paragraph 3 of the statement of grounds of appeal, or within the provisions of section 15 (1) of the Finance Act, 1896."

By order of the 2nd of March, 1904, the petitioner was given liberty to bring this appeal, on payment of the sum of £74 1*s.* 8*d.* with interest (if any) due thereon, she undertaking, in case the Court should decide in favour of the claim of the Commissioners, to be personally responsible for the balance of the duty claimed; and she had since paid this sum of £74 1*s.* 8*d.* with £4 6*s.* 5*d.* for interest to the 4th March, 1904.

Thereupon she filed this petition, which substantially sets forth the foregoing facts. The answer of the Commissioners set out in identical terms the facts and grounds contained in the notification of their determination to maintain the entire of their claim.

Ronan, K.C. (with him *Arthur Meredith*), for the petitioner :—

The question between Mrs. Lombard and the Crown is whether estate duty is payable on the difference between the values of the two properties, viz. the land and the Grand Canal shares, or on the entire absolute value of the land put in settlement by Mr. Lombard. There is no case which gives any assistance, and the Court will have to decide the question on two sections, viz., section 17 of the Succession Duty Act, 1853 (which the Revenue authorities very properly consider has an important bearing on the construction of the later Act), and section 3, sub-sections 1 and 2, of the Finance Act, 1894. First, take section 17 of the Succession Duty Act :—" No bond or contract made by any person *bonâ fide* for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to whom or with whom same shall be made ; but any disposition or devolution of the moneys payable under such . . . bond, or contract, if otherwise such as in itself to create a succession within the meaning of this Act, shall be deemed to confer a succession." It will be noted that the words are " *bonâ fide* for *valuable* consideration in money or money's worth," and not " for *full* consideration in money or money's worth." In *The Attorney-General* v. *Rathdonnell* (1) it was held that where money or money's worth passes on both sides, and the transaction is complicated by the additional consideration of marriage, the transaction is outside the section.

Now we come to section 3 of the Finance Act :—" 1. Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a *bonâ fide* purchase from the person under whose disposition the property passes, ... where such purchase was made . . . . for full consideration in money or money's worth, paid to the vendor or grantor for his own use or benefit. 2. Where any such purchase was made . . . . for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, . . . the value of the

(1) 32 L. R. Ir. 574.

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consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty." The effect of the section is that no consideration is to be taken into account except money or money's worth, and the cases of consideration in money or money's worth are divided into two simple classes, viz.—1, where the consideration is full; and 2, where it is partial. Where property passes by reason of the purchase, if the consideration is full, there is no duty, and if there is partial consideration, there is relief to the extent of the consideration. In other words, where there is partial consideration, there is a gift as to the residue, and the party pays upon that portion which is a gift, and not upon that portion which he has bought. The draughtsman of this Act had section 17 of the Succession Duty Act and *The Attorney-General* v. *Rathdonnell* (1), which has never been questioned, before him; and we submit that section 3 (2) of the Finance Act was passed to meet the very case which presents itself here. *The Attorney-General* v. *Johnson* (2) does not touch the present case.

The Solicitor-General and *Henry*, *K.C.* (with them *Coll*), for the Commissioners of Inland Revenue:—

It must be taken as settled that under section 17 of the Succession Duty Act, marriage contracts, no matter what other considerations in money or money's worth they contain, were excluded from the exemptions therein provided for: see *Attorney-General* v. *Rathdonnell* (1), which case turned, not so much upon the language of the section, as upon the general view of the law, that in marriage contracts, marriage was the real consideration. See Lord Westbury's judgment in *Floyer* v. *Bankes* (3). We submit that the intention to exclude marriage contracts is even clearer in section 3 of the Finance Act than it was in section 17 of the Succession Duty Act. The argument on the other side gives no effect to the words "by reason only" in section 3 of the Finance Act. These words exclude transactions where there is a *bonâ fide* purchase not only for money or money's worth but for the additional consideration of marriage. In other words, where there is a marriage consideration, the property does not pass by reason *only*

(1) 32 L. R. Ir. 574. (2) [1903] 1 K. B. 617. (3) 3 De G. J. & S. 306.

of a *bonâ fide* purchase for money or money's worth; it follows that marriage settlements are excluded from sub-section 1. *A fortiori* they are excluded from sub-section 2, because the purchase therein referred to is the very same class of purchase. The words are "where any such purchase." What is "such purchase"? Clearly, it is a *bonâ fide* purchase solely for consideration in money or money's worth. Mr. Ronan has construed the word "partial" in sub-section 2 as meaning part of the consideration, whereas it is to be contrasted with the word "full" in sub-section 1. From this contrast it receives the meaning "where the consideration is not full." Section 3 starts with words which directly and expressly exclude marriage contracts, because a marriage contract is a transaction that is not a *bonâ fide* purchase *only* for money or money's worth, but money or money's worth *plus* something else. Under both sub-sections, marriage contracts are out of the case altogether, and the only distinction is that under sub-section 1, the exemption is given in favour of a *bonâ fide* purchase for money or money's worth, where the consideration is full and adequate, and under sub-section 2 the deduction is given in favour of a *bonâ fide* purchase for money or money's worth, where the consideration is not full, but is only partial. [*The Attorney-General* v. *Dobree* (1), Channell, J.'s judgment at page 453, and *The Attorney-General* v. *Robinson* (2), were referred to].

Meredith, in reply:—

The word "only" does not qualify the word "consideration," as suggested on the other side. That is the fallacy underlying the position taken up by the Inland Revenue. The words "by reason only" qualify the word "passing." The property must pass *by reason only* of a *bonâ fide* purchase. In *the Attorney-General* v. *Dobree*, Darling, J., says (1):—"I think it is aimed at the kind of case where a person has bought something and paid for it a price—'a consideration in money or money's worth'—but is not to get the benefit of his purchase until the death of his vendor." This consideration shows what sort of instrument of purchase is

(1) [1900] 1 Q. B. 442, at p. 450. (2) [1901] 2 I. R. 67.

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contemplated. It must be a settlement—an instrument by reason of which the property will pass on death. A purchase from a reversioner would not fall within the section, for then the property would not pass by reason only of the purchase, but by reason of the purchase *and* the settlement. The settlement must of course be a *bonâ fide* purchase for money or money's worth paid to the vendor. There is nothing to prevent a marriage settlement being such. The settlement in this case is a bargain and sale on the face of it. What the wife got was not a jointure—a life interest in case she survived—but the property out and out whether she survived or not. See Hanson's Death Duties (edition 1897), p. 117.

Section 3 (2) contemplates part of the consideration being money or money's worth, and part being something else. There was no similar provision in the Succession Duty Act—there was no power to distribute the consideration—to allow a deduction for the pecuniary part of the consideration. See the construction of sections 7 and 17 in the judgment of Sir George Jessel in *Fryer* v. *Morland* (1). The Solicitor-General's view, that section 3 was meant to apply only to cases where there was no other consideration than money or money's worth, would necessitate an inquiry—sometimes years after—as to what was the value of the property years before—an impossible inquiry in many cases. Besides, why should such a purchaser be allowed a deduction, and a purchaser like the petitioner, who buys for money *plus* marriage, be denied a deduction? There would be no logic in such a construction. What the draughtsman contemplated, in a word, was, that where there had been a *bonâ fide* purchase, then, if there was any consideration besides the money, the money should be allowed as a deduction: section 3 (2). If there was no consideration besides the money, and the money was then the full consideration, the property should be exempt from duty: section 3 (1).

[The question under section 15 (1) of the Finance Act, 1896, was not argued.]

(1) 3 Ch. D. 675.

PALLES, C.B.:—

The question upon this appeal is, whether the value of 600 shares in the Grand Canal Company ought to be allowed as a deduction from the value of the property of the deceased for the purpose of estate duty under the Finance Act, 1894.

These shares were (by a settlement dated the 12th September, 1896, which was executed on the marriage of the appellant with the deceased, and certain transfers executed in pursuance thereof) transferred by the appellant to the deceased, and by the same settlement, the deceased, in consideration of such transfer and of the intended marriage, granted certain lands of Clonturk upon trust, from and after the death of the deceased, for the appellant.

It is admitted that these lands of Clonturk are to be deemed to have passed, upon the death of the deceased, within the meaning of section 2 of the Act; and the contention of the appellant is (1) that they so passed to her only by reason of the settlement of 12th September, 1896; and (2) that such settlement constituted a *bonâ fide* purchase of these lands from the deceased for partial consideration in money or money's worth for his own use and benefit, within the meaning of section 3 of the Act.

It has not been, and could not have been, contended by the Crown that the lands did not pass on the death of the deceased by reason of the settlement. It is admitted that the Grand Canal shares were acquired by the deceased under that settlement "for his own use and benefit"; and it is further admitted that the settlement was *bonâ fide*, in the sense of being a real transaction, intended to have effect as between the parties to it.

The Solicitor-General, however, insists that, as the purchase was in consideration, not alone of "money or money's worth," but also of marriage, it was not within the section, the word "only" excluding, as he contends, any purchase of which part of the consideration was marriage. He further insists that "for partial consideration in money or money's worth" does not mean "for a consideration part of which is money or money's worth," but that as "partial," in sub-section 2, is to be read in contradistinction to "full," in sect. 1, it includes a consideration in money or money's worth which, instead of being "full," is inadequate. Whether these contentions are right, are the questions for decision.

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Palles, C.B.

Before referring to section 17 of the Succession Duty Act, which has been so much relied upon, I desire to consider the words of section 3 of the Finance Act. Its subject-matter is a "purchase" "by reason only" of which the property passed to the deceased. The force of this word "only" is to restrict the act by which the property passed on the death to the purchase in question. That word, in the context in which it here occurs, according to its ordinary grammatical construction, excludes matters other than the purchase in question, but it does not qualify the character of the purchase itself. To give it the meaning the Solicitor-General contends for, we should transpose it from the place in which it actually occurs in the sub-section, and there is no subsequent place in that sub-section in which it would be required, or be appropriate. The force of "full consideration" in that sub-section cannot be increased by interpolating "only" in any place in which it would qualify or affect the consideration which is required to be full. The second sub-section, then, is the only place in which the word if transposed could find a place. This circumstance *per se* interposes the almost conclusive objection to the transposition, that if transposed it would relate to one only of the two distinct classes of purchase to which in its ordinary grammatical interpretation it applies. But further, when we seek to introduce it into the remaining sub-section, the only place in which it can fit is between "granted" and "for partial consideration in money or money's worth," so that the words would read "where 'such' purchase was made . . . *only* for *partial* consideration in money or money's worth"—words which on their face are almost, if not inevitably, nonsensical.

I do not pursue this consideration further. I fail to find in the statute any reason for which, even were it not a taxing enactment, any such transposition could be reasonably suggested. In a taxing statute, such as that before us, such a transposition is absolutely impossible.

Again, a purchase to be within the section is to be "*bonâ fide.*" Inadequacy of consideration for a purchase may, under certain circumstances, be a ground for holding it to be fraudulent, unreal, or otherwise not *bonâ fide*; but if the purchase be *bonâ fide*, the actual consideration, although there may be a suspicion of its

inadequacy, is in law the *whole* consideration; and there is no warrant in law for designating a consideration which was in fact the *whole* consideration for a *bonâ fide* purchase, as that which it is not, a "partial" consideration. It is not a "partial," it is the "whole," consideration; and in reference to a *bonâ fide* purchase, I cannot distinguish between the "whole" consideration and the "full" consideration.

Further, the same section which uses the words "full consideration" and "partial consideration" requires us to distinguish between two kinds of consideration; between "money or money's worth" on the one hand, and other considerations, such as marriage, on the other. Consideration within either class is sufficient to constitute valuable consideration for a purchase. Every day we say that the children of a marriage are *purchasers* for value under their parents' marriage settlement.

The subject-matter of the section is a purchase, the consideration for which may be (1) marriage only; (2) "money or money's worth" only; (3) both marriage and "money or money's worth." A purchase within class (1), one in consideration of marriage only, is clearly outside the section. A purchase within class (2), one in consideration of "money or money's worth" only, is clearly within, and is the sole subject-matter of, sub-section 1. What class of purchase then remains to form a possible subject-matter for sub-section 2? There can be but one answer to this question—the third class, the large class of purchases the consideration for which consists in part of marriage and in part of "money or money's worth." This includes a purchase by marriage settlement, where both the intended husband and the intended wife bring some property into settlement.

Now, let us take the words of sub-sect. 2 and see if any absurdity or inconsistency is created by referring it to this class of purchase as its subject-matter. "Where any *such* purchase"—words which are not limited to a purchase for money or money's worth, but extend to any *bonâ fide* purchase from the person under whose disposition the property passes—"was made for *partial* consideration in money or money's worth paid to the vendor or grantor for his own use and benefit." These words imply that there was another consideration in fact. This other consideration

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may, no doubt, be "money or money's worth," paid to persons other than the vendor or grantor, but so also may it be marriage; and in a taxing statute we have no power, in the absence of express words, or of an absolutely necessary implication, to so limit this additional consideration as to exclude marriage.

Upon the mere words of the section, therefore, were we to construe it as *res nova*, and without reference to prior legislation *in pari materiâ*, I should be of opinion that the contention of the appellant is correct.

The matter, however, becomes clearer when we consider the 17th section of the Succession Duty Act, and the decision thereon of the *Attorney-General* v. *Lord Rathdonnell* (1). The general purview and scope of the Act in which that section occurs is luminously pointed out by Sir George Jessel, M.R., in *Fryer* v. *Morland* (2). "It is in fact an Act to grant a duty on successions to property by persons succeeding to estates by *gratuitous* title . . . It assumes that a man gets something on the death of the prior owner, either by way of settlement, or by way of gift or descent, and *thereby gets a profit*. The only exception that I can find to that, on principle, is that a marriage consideration is treated as if it were a gratuitous title for this purpose. That kind of contract which is made on marriage to provide for the issue is treated as a succession."

The 17th section of that Act, which Sir George Jessel, in *Fryer* v. *Morland* (2), points out, includes cases many of which were altogether outside the Act, and for which, therefore, the provisions of that section were unnecessary, enacted that:—"No bond or contract made by any person *bonâ fide* for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the person, making such bond or contract and the person to or with whom the same shall be made."

Now, these words, differing in this respect from those of sect. 3 of the Finance Act, deal with the consideration as an indivisible whole. There is no provision authorising us to divide it into separate parts; no mention in it of "full" consideration or "partial" consideration. Further, the relief afforded by

(1) 32 L. R. Ir. 574. (2) 3 Ch. D. 675.

the provision, in respect of any contract within it, was immunity from succession duty upon *all* the property comprised in the contract. That relief could not be limited, as it is under the Finance Act, to the amount of that part of the consideration which was in money or money's worth. Thus, although the money brought into settlement by a wife might be small, and the property settled upon her and the issue of the marriage very considerable, then, if the settlement were *bonâ fide*, the entire property settled would be free from duty, and this by reason of a contract which would not have been made except in consideration of marriage—a result which would have been plainly in defiance of the Act.

Influenced by these considerations, amongst others, the late Exchequer Division, in a judgment in *Attorney-General* v. *Rathdonnell* (1), to which Andrews, J., and myself were parties, upon the construction of this section, held (and as I still think rightly) that contracts in which the consideration was *in part* money and in other part marriage were excluded from it. We were of opinion that, as the words plainly excluded the consideration of marriage, a contract in consideration of money *and* marriage was not a contract in consideration of money, as contradistinguished from one in consideration of marriage alone. The result, however, of this decision necessarily was that no part of the settled property, not even a portion of it equal to the pecuniary consideration, was exempted. Thus to this extent the actual words imposing taxation were held to go beyond, and to prevail against, the general intent of the Act. This, possibly, was a result unforeseen by the legislature. It appears to me that when the legislature had under its consideration the Bill, which afterwards became the Finance Act of 1894, which imposes death duties much larger than those authorised by the Act of 1853, it must have had its attention directed to this very decision, and that whilst it framed the new Act so as to give effect in relation to the new duties to the general intention of the previous Act, as expressed by Sir George Jessel; it so modified the words of the part of the new enactment which was *in pari materiâ* with the above 17th section, as to adapt it more accurately to the intention, by permitting the

(1) 32 L. R. Ir. 574.

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consideration to be divided, and by treating the interests taken under a marriage settlement as gratuitous only to the extent to which they had not been purchased by money or money's worth.

In my opinion the appellant is right, and the judgment should be for her, with costs.

ANDREWS and JOHNSON, JJ., concurred.

Solicitors for the petitioner: *O'Keeffe & Lynch.*

Solicitor for the respondent: *The Solicitor for the Inland Revenue.*

J. L.

K. B. Div. 1904.

April 19, 20.

THE KING (ROWELL) *v.* THE REGISTRAR OF JOINT STOCK COMPANIES FOR IRELAND (1).

Dentist—Company—Name of proposed Company involving false representation—Refusal to register—Mandamus—Dentists Act, 1878 (41 & 42 *Vict. c.* 33)—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 6.

The memorandum of association of a Company proposed to be formed for the purpose of carrying on the business of teeth extracting and artificial teeth making, provided that the name of the Company should be "S. G. Rowell, Dentist, Limited." None of the signatories to the memorandum (one of whom was S. G. Rowell) was registered as a dentist under the Dentists Act, 1878. The Registrar of Joint Stock Companies having refused to register the memorandum of association under the Companies Act, 1862:—

Held, that a mandamus would not be granted to compel him to do so, since the use by the Company of the proposed name would involve a false representation, tending to mislead the public.

MANDAMUS.

This was an application on behalf of the prosecutor to make absolute a conditional order for a writ of mandamus directed to

(1) Before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

the Registrar of Joint Stock Companies for Ireland, commanding him to register the Memorandum of Association of the Company, limited by shares, entitled "S. G. Rowell, Dentist, Limited," and to issue a certificate under his hand that such company was incorporated and limited. The memorandum of association in question stated that the name of company was S. G. Rowell, Dentist, Limited, and that the objects of the company were *inter alia* to establish and carry on the business of a teeth extractor, artificial teeth maker, and teeth specialist, at Clonmel in the county Tipperary, and elsewhere in the United Kingdom. The capital of the company was stated to be £300, divided into 300 shares of £1. The memorandum was signed by the prosecutor, S. G. Rowell, his wife Bridget Rowell, and five other persons described, respectively, as drapery manager, photographer, merchant, drapery manager, and creamery manager, each of the signatories agreeing to take one share. In the copy of the register of directors, the directors were stated to be Sidney George Rowell (the prosecutor), described as "mechanical dentist" of 30, Parnell-street, Clonmel, and Bridget Rowell, married woman, of the same address. In the notice of the situation of the registered office of the company, it was stated to be at 30, Parnell-street, Clonmel. The memorandum and other documents necessary for the registration of the company were presented to the Registrar of Joint Stock Companies for Ireland, who, however, declined to proceed with the registration of the company on the ground that the Board of Trade had the general question of Dentist Companies under consideration.

The prosecutor, in affidavits made by him for the purpose of obtaining the conditional order, stated that for three years past he had carried on the business of a dentist at 30, Parnell-street, Clonmel; that he was a mechanical dentist, and had served an apprenticeship of seven years to surgeon dentists in London; that in November, 1903, he decided to convert his said business into a limited company; that he did so *bonâ fide* for the more effectual carrying on of the said business, and because he believed that his said business could be more effectively and profitably carried on as a company, and not for any other reason or purpose.

A conditional order for a mandamus was granted and directed

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to be served on the Registrar of Joint Stock Companies for Ireland, and on Kevin E. O'Duffy, Esq., Hon. Sec. of the Irish Branch of the British Dental Association. In an affidavit, made by the latter and filed by way of cause against the conditional order, he stated that the application to register the Company, and the application for the mandamus, were resisted by him on behalf of the Irish Branch of the Association, on the ground that the application to register the Company under the Companies Acts was made for the fraudulent purpose of evading the provisions of the Dentists Act, 1878, and enabling the prosecutor, who was not, and never had been, registered under the Dentists Act, and was not entitled to be so registered, to take and use under the cover of the name S. G. Rowell, Dentist, Limited, the name, title, and addition of dentist, and thus to impose upon the public, and to invade the privilege of properly qualified and registered dentists, and by turning himself into a one-man company to escape the liability to prosecution and the penalties which would be inflicted on him if he were to take or use the name of dentist as an individual. That the assumption by the prosecutor of the description of "mechanical dentist" was illegal and misleading, and rendered him liable to prosecution under the Dentists Act, 1878; and that the assumption of the title of dentist, either alone or in combination with any other word or words such as "mechanical," was in direct contravention of the 3rd section of the said Act, inasmuch as the prosecutor was not a registered dentist under said Act. That of the seven persons who signed the memorandum of association, not one was a dentist or entitled to assume the title, and that the said seven persons were not associated together for any lawful purpose under the provisions of the 6th section of the Companies Act, 1862, but that they had conspired together for an improper and inequitable and fraudulent purpose, viz., to enable the prosecutor to evade the provisions of the Dentists Act, and to masquerade as a qualified dentist under the cover of the name of S. G. Rowell, Dentist, Limited. That the object of forming the Company was to arrogate the name of dentist, and by means of this imposition to obtain greater profits by leading the public who resorted to the prosecutor's premises to believe that they would be treated by a dentist. That the registration of so-called dentist companies had within the last few years

led to a system of gross frauds upon the public and the members of the dental profession, persons who had been successfully prosecuted for assuming the title "dentist," &c., without being registered under the Dentists Act, 1878, having formed themselves into companies under the Companies Acts, and assumed for these companies the title of "dentist," &c.

The prosecutor, in an affidavit made in reply, denied that he had converted his business into a Limited Company with the fraudulent intent alleged. He stated that he and his co-signatories to the memorandum of association were quite satisfied that if necessary, and the Court thought fit, the word "dentist" should be eliminated from the title of the proposed Company, and that they were prepared to pass any resolution necessary for the purpose.

Michael J. Dunn (with him *Ignatius J. O'Brien, K.C.*), for the prosecutor:—

It follows from the decision in *O'Duffy* v. *Jaffe* (1) that this Company is entitled to be registered. It is suggested that the use of the word "dentist" in the name of the Company is calculated to deceive the public. But the word is used with reference not to the individual S. G. Rowell, but with reference to the Company. This is made clear by its being followed by the word "limited." When applied to the Company, the word "dentist" cannot be held to deceive the public as amounting to an assertion that the Company are registered dentists, since it is the law that a company cannot be registered as dentists, and everyone is presumed to know the law.

A. W. Samuels, K.C., and *Gerald FitzGibbon*, for the Irish Branch of the British Dental Association:—

This case is not concluded by *O'Duffy* v. *Jaffe* (1). The point at issue there was whether when a company is once formed it can be prosecuted under the Dentists Act, 1878. We cannot, of course, ask the Court to reconsider *O'Duffy* v. *Jaffe* (1); but the question in this case is quite different. We contend that the

(1) *Ante*, p. 27.

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signatories to the memorandum of association are not "associated for any lawful purpose" within the 6th section of the Companies Act, 1862, and that such a company should not be registered. The Company is formed for the purpose of evading the Dentists Act, 1878; of fraudulently arrogating to S. G. Rowell, an unqualified person, under cover of a company, the title of "dentist," and of imposing on the public by the false representation that if they resort to the Company's premises they will be treated by a "dentist." The object of the Dentists Act is to protect the public from imposition by limiting the use of the title "dentist," &c., to such persons only as are registered under that Act, and who before being registered have to be properly qualified. A company cannot be registered under the Dentists Act; therefore, if it assumes the name of dentist, or any other such title, it holds itself out to be something which it cannot be, viz., a registered dentist. This would be a false pretence; and even if the Company, once it is formed, is not liable to prosecution, yet it is not for any "lawful purpose," but for an unlawful purpose, that the signatories associate to form it. The signatories have conspired to form a company with the fraudulent intention of annexing the benefit of the title "dentist," which can lawfully be assumed only by registered persons. This is an unlawful purpose: *La Société Anonyme des Anciens Etablissements Panhard et Levassor* v. *Panhard Levassor Motor Company, Limited* (1). A statutory duty is imposed by the Dentists Act on individuals who are not registered under that Act, not to assume the title of "dentist" or any such title as is mentioned in the 3rd section of that Act, and as Bowen, L.J., says in *The Queen* v. *Tyler and International Commercial Co.* (2): "Where, for instance, a statute creates a duty upon individual persons, it would be a strange result if the duty could be evaded by those persons forming themselves into a Joint Stock Company." "Could the highwaymen in *Everet* v. *Williams* have escaped liability by forming themselves into a limited Company": *La Société Anonyme des Anciens Etablissements Panhard et Levassor* v. *Panhard Levassor Motor Company, Limited* (1), *per* Farwell, J. This is an attempt to deceive the public by assuming a title to

(1) [1901] 2 Ch. 513. (2) [1891] 2 Q. B., at p. 592.

which, by statute, only registered dentists are entitled, and thus prejudicing not only the public, but the dentists' profession. The statutory right to register a company under the Companies Acts only exists where the person who is doing it is not, in doing it, violating some other right, or offending against the law: *Hendricks* v. *Montagu* (1), *per* Cotton, L.J. The conduct and motives of the applicant are not *bonâ fide* in seeking to register this Company; and on the ordinary principles upon which the Court acts in granting the prerogative writ of mandamus, the application should be refused. The Court will not allow itself to be made an instrument of fraud: Shortt on Mandamus, pages 223, 228; *R.* v. *Garland* (2); *R.* v. *Littledale* (3).

Coll, for the Registrar of Joint Stock Companies in Ireland, appeared, and submitted to the jurisdiction of the Court.

PALLES, C.B.:—

April 20.

We are asked to direct the issue of a prerogative writ of mandamus to compel the Registrar of Joint Stock Companies for Ireland to register under the Companies Act, 1862, the memorandum of association of a Company to be styled "S. G. Rowell, Dentist, Limited." Before I refer to the question arising on that application, I wish to put out of consideration one matter which has been mentioned during the argument and stated in the affidavits, viz.: that since the conditional order was made, an offer was made to alter the name of the proposed Company by striking out the word "dentist." The effect of such a change cannot be considered on the present application, because it is settled that there cannot be a successful application for a mandamus unless there has been a demand and refusal, and the demand upon the Registrar in the present case was to register this company under a name which included the word "dentist."

The argument in support of the application may be stated in one word. It was that the right to have a company registered under this name followed as a corollary from the decision in *O'Duffy* v. *Jaffe* (4). On the other hand, in opposition to the

(1) 17 Ch. D. 638, at p. 652.
(2) L. R. 5 Q. B. 269.
(3) 10 L. R. Ir. 78; 12 L. R. Ir. 97.
(4) *Ante*, p. 27.

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motion, whilst we are of course not asked to reconsider the question decided in *O'Duffy* v. *Jaffe* (1) (which we are wholly incompetent to do), it is said that the right to register a company with such a name depends upon considerations different from those which ruled *O'Duffy* v. *Jaffe* (1). It is said that the use by the company of such a name would involve a representation false in fact, which would reasonably tend to deceive the public, and that, as one must be deemed to intend the reasonable consequences of his act, the purpose for which the company would be formed would not be a "lawful purpose" within the meaning of section 6 of the Companies Act, 1862. Even had there not been an express enactment limiting the purposes for which a company may be formed to those which are lawful, I apprehend there could be no doubt that there is not a right to form a company under a name the use of which would reasonably tend to mislead the public in a matter in which they were entitled to know the truth. We have therefore to consider whether the use of the intended name by the Company would involve a false representation.

I assume that "person" in the second sentence of the 3rd section of the Dentists Act, 1878, is limited to a natural person, as was decided in *O'Duffy* v. *Jaffe* (1). I also assume, because it is so stated in the judgment, although I do not think it is exactly identical with the point *decided* there, that "person" in the first sentence of the 3rd section is also limited to a natural person; but I desire to say that, whilst deferring to the authority of that case, I express neither approval nor disapproval of it. Any such expression of opinion is not the function of a Court which is bound by the decision. My approval could not add to, nor could a contrary opinion by me detract from, either its authority or its weight.

These assumptions, however, appear to me not to touch the question here. It seems to me that upon the true construction of the Act it contains a statutory definition of the word "dentist," or its equivalent "a person specially qualified to practise dentistry," and declares the meaning of those expressions to be "a

(1) *Ante*, p. 27.

person registered under the Act," so that the statement that an unregistered person is a dentist, made by a person other than himself, although not a criminal offence, is an untrue statement.

The plain object of the Act is to enable the public to know whether persons practising as dentists are specially qualified to do so. To effect that object it prescribes that a register is to be kept which shall be styled "the dentists' register." The Act then contains many provisions enabling persons who are "specially qualified to practise dentistry" to procure their names to be placed on the register, and preventing the names of persons not so qualified from being placed thereon. But provisions of this description would be wholly ineffective unless some advantage were conferred upon registered persons, or unless unregistered persons were subjected to some disability. The advantage conferred on those who are registered is that they shall be entitled to practise dentistry in any part of His Majesty's dominions (section 5); but the Act does not prohibit an unregistered person from so practising. Such a person is not deemed to be specially qualified to practise, but the Act leaves him free to practise. So far it does not confer any advantage upon registered persons. Then it enacts that an unregistered person "shall not be entitled to recover fees for any dental operation, or for any dental attendance, or advice."

This disability would, in my view, and I think in the view of the Legislature as apparent on the Act, have been a very insufficient means of preventing unqualified persons practising; but if I am right in holding that the real object of the Act was to enable the public to know who were "specially qualified to practice dentistry," or, in other words, who were dentists, and with this knowledge to leave them free to employ qualified or unqualified persons at their option, all that would be necessary to effectuate the purpose would be to define who were "dentists" by a description which would exclude unqualified persons. This I think they did. Persons whose names are entered on the register are *ipso facto* "dentists," as the register is one of "dentists." But the words of section 11, which directs the keeping of the register, are not *per se* sufficient to prevent any person not on the register from being a dentist. But then section 3 in its first sentence

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disentitles an unregistered person from *taking* the name or title of "dentist" or "any name, title, addition, or description implying that he is a person specially qualified to practise dentistry," and by the next sentence of the section, such taking or using is made a criminal offence.

What is the effect of these provisions? He cannot take the title of "dentist." Why? Because it is not his title—because he is not a dentist. A man can lawfully call himself what he is. He cannot be guilty of a criminal offence by truly styling himself what he is. Therefore, unless the 3rd section is to be held to involve absurdity and injustice, it must involve this, that the criminal offence is the styling himself *that which he is not.* Thus an unregistered person by styling himself a dentist makes a misstatement calculated to deceive, presumably with a view to his own profit, and certainly to the great detriment of the public; and it is in entire consonance with the spirit of our criminal law to constitute this an offence. Whereas, if you exclude the falsity of the statement, the *corpus delicti* is one outside the class of acts usually made offences by modern statutes.

Upon the whole I am satisfied that the true meaning of the statute is, that in the view of the Legislature an unregistered person is not a dentist; and although the statement by one person that an unregistered person (other than himself) is a dentist, is not a criminal offence, because it is not so constituted by statute, it still is a false statement.

I take now the proposed title of this Company, "S. G. Rowell, Dentist, Limited." If the word "dentist" is to be taken to refer to S. G. Rowell, the name would involve a false statement; S. G. Rowell is not a registered dentist. On the other hand, if it is to be taken that the word "dentist" refers to the Company and not to the individual S. G. Rowell, and that the whole expression means that the Company is a dentist, still, reading dentist, as I hold it should be read as meaning registered dentist, a false statement would be involved, because the Company is not (and could not be) registered under the Act.

Mr. Dunn has argued that everyone is to be presumed to know that a Company cannot be registered under the Dentists Act, and as the word "limited" in the name indicates that the per-

son referred to is a company, therefore no one can be deceived by the name. I do not agree in this; in my opinion there is not in such a case any such presumption, and I entertain no manner of doubt that the name, if the Company be formed, will deceive many, if indeed such deception is not one of the purposes for which the Company is sought to be formed.

This, in my opinion, concludes the whole case. I think that this Company is applying to be registered under a name in consequence of which every one of its acts, every use of its name, will involve a false representation, and that this is done deliberately, if not for the purpose of representing, at least with the knowledge that its effect will be to represent, to the public that the business of a dentist is being carried on by the Company through agents who are persons "specially qualified to practise dentistry," when in fact the agents so acting either are not, or at least need not necessarily be, so specially qualified. As the aid of this Court, and of the prerogative writ of mandamus, cannot be granted either for the purpose or with the effect of perpetrating a fraud, this application ought to be refused; and, of course, refused with costs.

ANDREWS and JOHNSON, JJ., concurred.

Solicitor for the prosecutor: *John Cashin.*

Solicitors for the Irish Branch of the British Dental Association: *W. G. Bradley & Sons.*

Solicitors for the Registrar of Joint Stock Companies for Ireland: *D. & T. Fitzgerald.*

J. G. T.

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HIS MAJESTY'S ATTORNEY-GENERAL FOR IRELAND, INFORMANT; JOHN JAMESON, GEORGE JAMESON, AND WM. ROBERTSON, DEFENDANTS (1).

Company—Articles of association—Shares—Restrictions on transfer—Right of pre-emption—Estate duty—Principle of valuation—Sale in open market—Property passing on death—Repugnancy—Rule against perpetuity—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 16—*Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 3, 5; 7, *sub-s.* 5; 13, 22 (*b*).

By will, dated the 26th July, 1901, a testator devised all the residue of his property to his executors upon trust, to pay the interest of one-sixth part thereof to each of five of the testator's sons and daughters, respectively, for life; and of the remaining one-sixth part, to such of the children of a deceased daughter as should then be living, in equal shares; and he directed that, subject to the said life estate, his trustees should hold the said respective sixth parts or shares (save as to the share of one daughter, which, after her death, was to be held in trust for the remaining residuary legatees) upon trust, for such person or persons as the parties respectively entitled to a life interest in the said shares might by deed or will appoint.

The testator died on the 15th September, 1901, and the said will was duly proved by the three executors therein named. The residuary estate of the testator included 750 fully paid-up shares in the firm of J. J. & Son, Ltd., a Company registered on the 9th October, 1891, under the Joint Stock Companies Acts, dividends upon which had been paid by the Company for some years previously to the testator's death at the rate of twenty per cent. per annum.

The articles of association of the Company contained an elaborate series of provisions relating to the registration of holders and to the alienation of shares in the Company, whereby it was (*inter alia*) provided that any member proposing to transfer a share should serve a "transfer notice" upon the Company (who were not bound to recognise any equitable claim in a share) of his intention to transfer, which notice constituted the Company his agent for the sale of the share to any member at the "fair value thereof," the latter being defined as a sum of £100, or such other sum as should from time to time be fixed as the "fair value" by resolution of the Company in general meeting. No share could, save as therein provided, be transferred to a non-member so long as any member was willing to purchase the same at the "fair value," the directors being empowered to refuse to register any transfer to a non-member

(1) Before PALLES, C.B., and BOYD and KENNY, JJ.

of whom they did not approve, such transfer being void. Upon the Company, within twenty-eight days after the service of the "transfer notice," finding a member willing to purchase, the retiring member was bound, upon payment of the "fair value," to transfer the share to the purchasing member, in default of which the Company might receive the purchase-money and enter the name of the purchasing member in the register as the holder of the share. In the event of the Company not finding a purchaser within the twenty-eight days specified, the retiring member might, within three months, sell and transfer the share to any person, subject to the approval of the directors, and at any price. It was also provided that the executors or administrators of a deceased member should be the only persons recognised by the Company as having any title to the shares registered in the name of such member, and that any person becoming entitled to a share in consequence of the death of any member might, subject to the regulations contained in the articles, transfer such share to himself or any other person; the executors of a deceased member being further empowered, subject to the approval of the directors, to transfer the share of such member to his son or brother, or to any son or brother of any existing member.

Upon the death of the testator the executors paid for estate duty in respect of the said 750 shares a sum calculated on the basis that the value thereof was, having regard to the right of pre-emption and restrictions on transfer and sale contained in the articles, limited to the "fair value" of each share fixed by the articles at £100, and refused to pay any further duty.

On an information by the Attorney-General, seeking a declaration that on the death of the testator estate duty became payable, under the Finance Act, 1894, upon the principal value of the said shares, being the price which same would fetch if sold in the open market at the time of the testator's death, and that such value was not limited to the "fair value" of £100 a share, or for the determination of the manner in which such value was to be ascertained:—

Held, (1) That the principal value of the shares to which the testator was entitled at the time of his death was to be estimated at the price which the same would, in the opinion of the Commissioners of Inland Revenue, fetch if sold in open market at the time of such death, and that such principal value was not necessarily limited to the par or "fair value" of £100 a share.

(2) *Per* Boyd and Kenny, JJ. (Palles, C.B., *diss.*), that in estimating such principal value regard was to be had by the Commissioners to the special provisions in the articles of association with reference to alienation and transfer of the shares of the Company, and as to the "fair value" thereof.

(3) *Per* Boyd and Kenny, JJ., that the articles of association were not invalid, either as infringing the rule against perpetuity, or as being repugnant to the right of alienation inherent in absolute ownership.

Held, *per* Palles, C.B. (without expressing any opinion as to the validity of the articles), that inasmuch as the entire legal and equitable interest in the shares was vested in the testator at the time of his death, the whole of such

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ATTY.-GEN. v. JAMESON.

interest formed portion of the deceased's property passing on his death within section 1 of the Finance Act, 1894, and was accordingly subject to the payment of estate duty, that portion of the value of the shares which represented the right of pre-emption being properly within section 2, sub-section (*b*) of the Act, and therefore deemed to pass, and that, on the true construction of section 7, sub-sect. 5, of the Finance Act, the valuation of the shares ought to be based upon a supposititious, not an actual, sale in the open market, excluding the consideration of such provisions in the articles of association as would prevent a purchaser at the sale from becoming a member of the Company, and registered as such in respect of the shares purchased by him at such supposititious sale.

Borland's Trustee v. *Steel, Bros., & Co., Ltd.* ([1901] 1 Ch. 279), followed.

INFORMATION at the suit of His Majesty's Attorney-General for Ireland, on behalf of His Majesty, addressed to the Right Honourable the Lord Chief Justice of Ireland, and to the rest of the Judges of the King's Bench Division of the High Court of Justice in Ireland, as follows :—

Henry Jameson, late of Hermitage, Roebuck, in the county of Dublin, deceased, by his will, dated 26th July, 1901, appointed his two nephews, the defendants John Jameson and George Jameson, and his son-in-law, the defendant William Robertson, the executors thereof, and, after divers pecuniary and other bequests, devised all the rest of his property to his executors (thereinafter called his trustees) upon trust out of his said properties and effects other than his shares in the firm or business of John Jameson & Son, Ltd., Bow-street Distillery, in the city of Dublin, to pay or transfer to the defendant William Robertson the sum of £47,000, to be held by him upon trust to set apart such parts thereof, and to pay the dividends and interest in such parts during the times and to the persons therein particularly mentioned; and the testator directed that in case the property he should leave, other than his shares in the said firm of John Jameson & Son, should not be sufficient to pay the said sum, then his trustees should, out of the dividends, interest, and income of his entire properties and effects, including the said shares in the firm of John Jameson & Son, Limited, pay the dividends and interest on said sums, together also with the annuities therein mentioned to the persons therein specified. The testator (*inter alia*) directed that his trustees should hold the rest, residue, and remainder of

his estate and effects, including therein his shares in John Jameson & Son, Limited, upon trust to pay the dividends, interest, and profits of one-sixth part thereof unto his son, John George Jameson, for his life; of one other sixth part thereof to his son, Henry Robert Jameson, for his life; of one other sixth part thereof to his daughter, Margaret Robertson, for her life, for her sole and separate use; of one other sixth part thereof to his daughter, Anna Jameson, for her life, for her sole and separate use; of one other sixth part thereof, to his daughter, Elizabeth Alice Jameson, for her life, for her sole and separate use; and of the remaining one-sixth part thereof to such of the children of his deceased daughter, Isabella Mary Cardew, as should be living, in equal shares; and he thereby directed that, subject to the respective life-estates thereinbefore given in the said several sixth parts of his said residuary estate, his trustees should hold the said respective sixth parts or shares of his said residuary estate, except the one-sixth share of his daughter, the said Anna Jameson (which after her death he directed to be held upon trust for the remaining residuary legatees), upon trust for such person or persons as the person or persons respectively entitled to a life-interest in the said respective sixth parts, except as thereinbefore mentioned, might, by deed or will, leave and bequeath, and in default of such appointment by deed or will, the one-sixth share to go among the children of such person equally.

Henry Jameson died on 15th September, 1901, and his said will was duly proved by the defendants, his executors, on 19th November, 1901. The defendants paid to the Commissioners of Inland Revenue £7,243 6*s.* 4*d.* for estate duty at six per cent. in respect of personal property amounting to £120,140 1*s.* 6*d.*, and also paid £221 14*s.* 4*d.* for estate duty in respect of the real property of the testator, and £25 7*s.* 7*d.* settlement estate duty in respect of a portion of such real estate.

Part of the testator's estate at his death consisted of 750 fully paid-up shares in the firm existing at the date of his death, and known as the firm of John Jameson & Son, Limited, which was a Company established under the Joint Stock Companies Acts for carrying on the business of distillers at Bow-street, in the city of Dublin, and registered on the 9th October, 1891. The capital of

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the Company was £450,000, divided into 4500 shares of £100 each. The 750 shares belonging to the testator formed part of the said 4500 shares.

The articles of association of the said Company contained special provisions relating to the registration of the holders and to the alienation of the shares in the said Company, and, amongst others, the following clauses:—

Clause 5 provided that, "The Company shall be entitled to treat the registered holder of any share as the absolute owner thereof, and shall not be bound to recognise any equitable or other claim or interest in such share on the part of any other person, save as herein provided"

Clause 6 provided that, "A share may be transferred or bequeathed to any person who is already a member, but no share shall, save as hereinafter provided, be transferred to a person who is not a member, so long as any member is willing to purchase the same at the 'fair value.'"

Clause 7 provided that, "In order to ascertain whether any member is willing to purchase a share, the person, whether a member of the Company or not, proposing to transfer the same (hereinafter called the retiring member) shall give notice in writing (hereinafter called the transfer notice) to the Company that he desires to transfer the same. Such notice shall constitute the Company his agent for the sale of the share to any member of the Company at the 'fair value.' The transfer notice may include several shares, and in such case shall operate as if it were a separate notice in respect of each. The transfer notice shall not be revocable except with the sanction of the directors."

Clause 8 provided that, "If the Company shall, within twenty-eight days after being served with such notice, find a member willing to purchase the share (hereinafter called the purchasing member), and shall give notice thereof to the retiring member, he shall be bound, upon payment of the 'fair value,' to transfer the share to the purchasing member."

Clause 9 provided that, "The fair value of a share shall be £100, or such other sum as shall from time to time be fixed as the 'fair value' by resolution of the Company in general meeting."

Clause 10 provided that, "If in any case the retiring member, after having become bound as aforesaid, makes default in transferring the share, the Company may receive the purchase-money, and shall thereupon cause the name of the purchasing member to be entered in the register, as the holder of the share, and shall hold the purchase-money in trust for the retiring member. The receipts of the Company for the purchase-money shall be a good discharge to the purchasing member, and after his name has been entered in the register in purported exercise of the aforesaid power, the validity of the proceedings shall not be questioned by any person."

Clause 11 provided that, "If the Company shall not within twenty-eight days after being served with the transfer notice find a member willing to purchase the share, and give notice in manner aforesaid, the retiring member shall at any time within three months afterwards be at liberty, subject to clause 31 hereof, to sell and transfer the shares (or those not placed) to any person (subject to the approval of the directors) and at any price."

Clause 12 provided that, "The Company in general meeting may make, and from time to time vary, rules as to the mode in which any shares specified in any transfer notice shall be offered to the members, and as to their rights in regard to the purchase thereof, and in particular may give any member or class of members a preferential right to purchase the same. Until otherwise determined every such share shall be offered to the members in such order as shall be determined by lots to be drawn in such manner as the directors think fit, but no member who shall have accepted or refused an offer of a share shall be entitled to a second offer until every other member for the time being shall have received an offer of a share."

Clause 13 provided that the instrument of transfer of any share should be signed both by the transferor and the transferee, and that the transferrer should be deemed to remain the holder of such share until the name of the transferee was entered in the register in respect thereof.

By clause 15 the directors were entitled to close the transfer books during such time, not exceeding thirty days in each year, as they should think fit.

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By clause 16 it was provided that the executors or administrators of a deceased member, not being one of the several joint holders, should be the only persons recognised by the Company as having any title to the shares registered in the name of such member; and in the case of the death of any one or more of the joint holders of any share, the survivors should be the only persons recognised by the Company as having any title to, or interest in, such share.

By clause 17 it was provided that any person becoming entitled to a share in consequence of the death of any member, upon producing such evidence that he sustained the character in respect of which he proposed to act under this said clause, or of his title, as the directors might think sufficient, might, subject to the regulations therein contained, transfer such share or shares to himself or any other person.

By clause 18 it was provided that, subject to the approval of the directors, any share might be transferred by a member to any son or brother of such member, or to any son or brother of any existing member, and that any share of a deceased member might be transferred by his executors or administrators to any son or brother of such deceased member, or to any son or brother of any existing member.

By clause 20 the directors might refuse to register any transfer of a share when the Company had a lien on the share, or to a transferee, not being already a member, of whom they did not approve.

Clause 22 provided that if any person, not being already a member, should have become entitled, either on producing evidence that he sustained any particular character, or without producing such evidence, to transfer a share to himself, either alone or in conjunction with any other person whether already a member or not, the directors might give notice to such person that they declined to admit him as a member, and thereupon the Company should be deemed to have been served with a transfer notice in respect of such share; and—

By clause 23 a transfer made to any person not being already a member, of whom the directors should not approve, should be void.

The dividends payable by the said Company on their shares for some years previously to the testator's death were at the rate of, at the least, twenty per cent. per annum.

The defendants John Jameson and George Jameson were registered as shareholders in the books of the Company for the said 750 shares.

Since the date of the death of the testator the said firm of John Jameson & Son, Limited, then in existence, was voluntarily wound up, and all the property thereof was duly transferred to a new Company styled John Jameson & Son, Limited, which was duly incorporated under the Companies Acts, 1862 to 1900, for carrying on the business of distillers at Bow-street in the city of Dublin, and having a share capital of £450,000, divided into 4,500 shares of £100 each, and upon formation the said new Company issued £450,000 four per cent. debenture stock in multiples of £10. The defendants contended that the value of the said 750 shares in the said late Company of John Jameson & Son, Limited, for the purposes of estate duty was limited to the "fair value" of each share fixed by the articles of association of the said Company at £100, and paid a sum purporting to be calculated on this basis, and refused to pay any further duty in respect of the said shares. The principal value of the said shares, being the price which same would fetch if sold in the open market, was at the testator's death, and is now, much greater than the "fair value" as fixed by the said articles of association.

The Attorney-General, on behalf of His Majesty, submits that estate duty is payable on the principal value of the said shares, being the price which same would fetch if sold in the open market at the time of the death of the deceased testator, and not merely on the amount actually paid up, or on the "fair value" thereof as fixed by the said articles of association, and that the said estate duty is now a debt due and payable to His Majesty.

The Attorney-General, on behalf of His Majesty, therefore prays:—

(1.) That it may be declared that upon the death of the said Henry Jameson, estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value of the said 750 shares in the said Company of John Jameson & Son, Limited,

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being the price which same would fetch if sold in the open market at the time of the death of the deceased testator, and that such value is not limited to the par or "fair value" of £100 a share, notwithstanding the special provisions as to the "fair value," and as to the alienation of the shares of the said Company, contained in the said articles of association of the said Company, or that it may be determined in what manner such value is to be ascertained, and what is the principal value of such shares for the purposes of the said Act.

(2.) That an account may, if necessary, be directed to ascertain the amount of the estate duty, and interest thereupon properly payable in respect of the said shares (after deducting the amount already paid by the defendants in respect thereof as hereinbefore mentioned), and that the defendants may be ordered to pay the amount of the said duty and interest to the Commissioners of Inland Revenue.

The defendants by their defence admitted the allegations contained in the information, save as regards the value of the said 750 shares of the testator, in respect of which they pleaded as follows:—

"The defendants say that the value of the said 750 shares in the said late Company of John Jameson & Son, Limited, is for the purposes of estate duty necessarily the same as 'the fair value' of each share as fixed by the articles of association of the said Company at £100, for the following reasons, viz.:—The value of the said shares for the purposes of estate duty is prescribed by the Finance Act, 1894, to be the principal value which the said shares would fetch if sold in the open market at the time of the death of the deceased, and the said shares if so sold in the open market could not have realised more than £100 each, the amount fixed by the said articles of association as 'the fair value' of same, and most probably would not have realised even that amount; for the outside price which a purchaser in the open market would be safe in paying for the said shares, having regard to the provisions contained in the said articles of association, which are set out in the information, would be the sum of £100. His purchase of the shares in the open market would give him no right whatever to have the shares transferred to him in the books of the Company, and registered in

his name; and if he was foolish enough to pay more than £100 each for the shares, he would be liable to have, and would almost certainly have, the shares taken from him and given to some member of the Company on payment of £100 a share, and he would lose any excess of price which he had paid over the said sum of £100. Under the said articles of association, it is only in the very remote contingency of there being no member of the Company willing to take the shares at £100 each, that a purchaser in the open market could hope to get the shares transferred to him at all, and as this contingency has never arisen in the history of the Company, and is not likely to arise, the shares of the Company have no saleable value whatever in the open market.

"The defendants further say that the right of pre-emption and restrictions on transfer and sale in the case of shares in the said Company of John Jameson & Son, Limited, cannot be treated as non-existent in arriving at the value of said shares for the purposes of estate duty, and in assessing such value the Commissioners of Inland Revenue must treat these shares as being choses-in-action entitled to such advantages as are conferred by the constitution of the Company, and subject to all the disadvantages imposed by such constitution; they must also take into consideration the probability of the exercise of the said right of pre-emption and the ability of the persons who have the right to exercise it; and having due regard to these considerations, the defendants say that the principal value of the said shares, being the price which same would fetch if sold in the open market, was not at the testator's death and is not now greater than the 'fair value' as fixed by the said articles of association.

"The defendants further say that the Commissioners of Inland Revenue never assessed any sum as the value of the said shares, and never purported to ascertain their value on any principle, or in any manner as required by the Acts in that behalf, and the only attempt at a valuation was a note written by one of their officials on the residuary account of the testator's estate presented by the defendants, as follows:—'Would not £300,000 be a fair estimate of such value?' And the defendants say that this said sum of £300,000 was arrived at by ignoring altogether the restriction on the right of free transfer and sale imposed by the articles

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of association, which would be binding on any purchaser of said shares; and that in no event could the said sum of £300,000 be the principal value which said shares would bring in the open market.

"The defendants will submit that the Commissioners of Inland Revenue should have properly assessed what, in their opinion, would be the price which said shares would fetch if sold in the open market at the time of the death of the deceased, and should have demanded from the defendants the estate duty payable in respect thereof, and then the defendants, if dissatisfied with the amount of such assessment, would have had the right of appeal to the High Court of Justice in Ireland, under section 10 of the Finance Act, 1894, and could have had the amount of duty payable by them determined by this Court on a petition, and they will submit that these proceedings are unnecessary and oppressive."

The Attorney-General (*The Rt. Hon. J. Atkinson, K.C.*), *The Solicitor-General* (*Campbell, K.C.*), and *Coll*, for the Crown :—

Our primary contention is that estate duty is payable on the principal value of the shares of the deceased, totally irrespective of the "fair value" of such shares as fixed by the articles of association.

By sect. 7, sub-sect. 5, of the Finance Act, 1894, the principal value of the property must be estimated to be the price which, in the opinion of the Commissioners, such property would fetch "if sold in the open market at the time of the death of the deceased." It is not competent for the owners of property, by arrangement amongst themselves, to so restrict the transferable or negotiable character of such property that it cannot be sold in the open market, so as to avoid the test of a sale in open market, and thereby escape payment of estate duty in respect thereof.

The defendants recognise the necessity of having the value estimated by reference to a sale in open market, and contend that at such a sale no greater price than the fair value could be realised.

The same reasoning would apply if the fair value had been

fixed at £50. The revenue cannot be defrauded in this manner. There must be a supposititious sale at which all the world is free to purchase, and a purchaser at which would be entitled to be registered as a member of the Company in respect of his purchased shares. That a supposititious sale is contemplated, is shown by the wording of sect. 7, sub-sect. 5, "if sold in the open market." It is immaterial if, as contended, the shares cannot actually be brought into the open market. The Finance Act provides for the payment of duty upon the principal value of all property, real or personal, settled or not settled, which passes upon the death of an individual (section 1). Sections 1 and 5 expressly provide for the raising of duty on settled property—property which cannot be brought into the open market in the sense contended for. *The Attorney-General* v. *Sefton* (1) will be cited as an authority that this property should escape taxation, but that case has no application. Where an Act of Parliament only taxes property in reference to its annual income, a property which has no annual income must escape. Here the Commissioners must assume a market value. The shares of the testator were property which passed on his death within the meaning of section 1; at his death every penny of the value of the shares he possessed still existed. Assuming the provisions as to pre-emption and in restriction of alienation to be valid, and that they apply to this case, the only difference effected by the articles of association is in the distribution of that value. The entire value passed; part may have passed under the testator's will, and part under the articles of association, to the individuals entitled thereto; but all passed (sections 1 and 2 (*b*)), and the Commissioners are not concerned with the devolution of the property, but with the property that passed: *Earl Cowley* v. *Commissioners of Inland Revenue* (2). The Commissioners might, under section 13, have accepted a composition by reason of the complicated nature of the interests of different persons in the property that passed.

Section 22 (*l*) defines "property passing on the death" as including property passing either immediately on the death, or after any interval, either certainly or contingently. Allowing

(1) 11 H. L. Cas. 257. (2) [1899] A. C. 198.

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the articles of association their widest effect, these shares come within this section as property passing "on a contingency," namely, that the existing members will not exercise the power of pre-emption. Each share is, in effect, subject to three contingencies, two of which are disregarded by the defendants—1. That an existing member will exercise his right of pre-emption; 2. That no member will exercise that right, and that the share will be sold in open market, at whatever price it will fetch; and 3. That the owner may be able, by the exercise of his right of pre-emption, to buy up the entire shares. The defendants, in contending that £100 is the maximum price obtainable in a sale in open market, make the first contingency a certainty, and ignore the other two.

Under clause 5 of the articles of association the Company is freed from any obligation to recognise trusts, but that clause does not prevent the property of any shareholder from being bound by any trust he chooses to impose upon it. Clauses 7 and 8 deal solely with the legal transfer of the shares, not with the mode of enjoyment of them, and any shareholder may become party to a deed declaring a trust of his property, or may execute an equitable mortgage thereof, without the legal title being affected. The testator has himself dealt with this property as one over which he had absolute dominion. Further, two of the defendants, John Jameson and George Jameson, are registered as shareholders "as executors of Henry Jameson, deceased." Accordingly, whatever difficulty might be suggested as to the legal transfer of the shares, assent has been given to the vesting in these two executors of the interest of the testator in the shares. So long as the beneficial interest in shares, admittedly bearing twenty per cent. dividends, is capable of being transferred in this manner, it is idle to contend that the capital value is limited to £100. We are here dealing with executors, and it is submitted that clauses 6, 7, and 8 do not refer to the case of executors, but to living members desirous of transferring shares. Otherwise they would be inconsistent with clause 17, under which there is an absolute right conferred upon the executors of a deceased member to transfer, without the consent of anyone, to a person who is not a member, namely, to a son or brother of the deceased member.

Clauses 17 and 18 constitute a separate code applicable to executors, under which executors have an absolute right to sell, and transfer, subject only to the approval of the directors. The necessity for the latter does not affect the market value of the shares, such approval being regarded as a mere matter of form; Lindley on Companies, 6th ed., 646. It is admitted that under clause 18 executors may transfer any share of a deceased member to any son or brother of such deceased member, but the value of such shares for the purposes of estate duty cannot vary according as to whether or not such deceased member had a son or brother. The question would never have arisen had the members carried out the duty and obligation imposed upon them by clause 9, namely, to alter the "fair value" from time to time as the shares rose or fell. Each existing member had an interest in keeping the "fair value" as low as possible in view of the possible exercise by him of the right of pre-emption. No Court of Equity would allow the existing members of the Company to insist, as against the defendants, that £100 is now the "fair value," and relief would be given against any attempt to enforce the provisions as to pre-emption at the price of £100 a share. That the testator was himself a consenting party down to the date of his death, and might have benefited by the arrangement in case of the death of another member, is immaterial if, as we contend, the whole agreement is void as against the policy of the law. Clause 11 is entirely illegal. It is clear that the special provisions as to the "fair value," and as to the alienation of the shares, contained in the articles of association, were introduced for the express purpose of retaining shares of the Company in the family of the Jamesons, from year to year, and excluding the public from any participation in them, the machinery adopted being the keeping of the "fair value" below the actual or intrinsic value of the shares. This is an infringment of the rule against perpetuity. The provisions against alienation constitute as great a fetter on the right of alienation, which is inherent in the ownership of property, as if the members were prohibited from selling at all: *Bradley* v. *Peixoto* (1); *Attwater* v. *Attwater* (2); *Dugdale* v. *Dugdale* (3). They are a mere colour-

(1) 3 Ves. 323. (2) 18 Beav. 330. (3) 38 Ch. D. 176.

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able compliance with the law, and, even if binding upon the members *inter se*, cannot have the effect contended for, namely, to prevent the shares being valued for the purposes of estate duty at the price which they would fetch if sold in the open market.

Ronan, K.C., Matheson, K.C., and *Brunskill*, for the defendants :—

The contention of the defendants is fully stated in the defence. We admit that the value of the testator's shares must, for the purposes of estate duty, be estimated to be the price which they would fetch if sold in open market, but if so sold, these shares could not have realised more than £100 each, that being the maximum sum any purchaser would give for a share, knowing that it could be taken from him at the "fair value." It is probable that having regard to the provisions in the articles of association, no purchaser could be got at all, in which case there would be no market price, and the shares must escape taxation: *The Attorney-General* v. *Sefton* (1). The argument of the Crown is based upon a mistaken conception of the nature of a share, the true definition of which is given by Farwell, J., in *Borland's Trustee* v. *Steel, Bros., & Co., Limited* (2). The absolute right of pre-emption annexed to each share, and the restrictions on the transfer thereof, cannot be disregarded and treated as non existent. Such restrictions are original incidents of the share itself: *Borland's Trustee* v. *Steel, Bros., & Co., Limited* (2); *Casey* v. *Bentley* (3). The shares of the testator cannot, for the purpose of assessing duty thereon, be treated as something different from what they are.

It is clear that the provisions as to pre-emption apply to the case of executors. Under clause 16 the executors or administrators of a deceased member are the only persons recognised by the Company as having any title to the shares of the deceased; and by clause 17 the right of any person becoming entitled to a share, in consequence of the death of any member, to transfer such share to himself or any other person, is expressly made subject to the regulations contained in the articles of association. An executor,

(1) 11 H. L. Cas. 257. (2) [1901] 1 Ch. 279.
(3) [1902] 1 I. R. 376, 383.

therefore, proposing to transfer, must, in accordance with clause 7, give the transfer notice to the Company. That clause does not, as suggested, merely deal with the legal transfer; and, taking the contract as a whole, a purchasing member must acquire the beneficial interest in the share purchased.

The executors were not bound to pay estate duty on all the property that passed on the death of the testator. Sect. 2 of the Finance Act defines what property is deemed to pass on the death of a deceased person. Executors must pay duty in respect of all property of which the deceased was at the time of his death competent to dispose (sect. 6, sub-sect. 2); as to property comprised in sect. 2 (*b*), they are not bound to pay. This is made clear by the provisions of sect. 8, sub-sect. 4.

Of what, then, was Henry Jameson competent to dispose? He had the right to hold the shares himself, and to receive the benefit thereof; he had also, under the articles of association, the right to assign or transfer them to any other existing member, to a son or brother of any existing member, and also to a son or brother of his own; his right of disposing of the shares, as distinct from his right of holding the shares, was limited to this. Similarly, the right of disposition of Henry Jameson's executors was limited to a transfer to any existing member, to the son or brother of any member, or to the son or brother of their testator. It is necessary to distinguish between value as ascertained for the purposes of the Succession Duty Act, or "holding value," and value as ascertained for the purposes of the Finance Act, or "selling value." Where property is held subject to a right of pre-emption, "holding value" equals the "selling value" plus the value of the right of pre-emption; the selling value is less than the "holding value" by the value of the right of pre-emption. It is incorrect to say that part of the interest of Henry Jameson in the shares passed under his will, and part under the articles of association. Whatever Henry Jameson had passed under his will, so far as the saleable value was concerned. For the purposes of holding each share may, as suggested by the Commissioners, have been worth £400. But for the purposes of sale, Henry Jameson had not 750 shares worth £400 each; the right of pre-emption did not belong to him; so far as the saleable value of the shares was concerned, the right of pre-emption never

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passed at all: that was vested in the other members of the Company before his death, and remained in them after his death; it was not his, he was not competent to dispose of it, and his death effected no change in it. Sect. 5, sub-sect. 5, is conclusive that "selling value" and "holding value" are two different things, and for the purposes of estate duty, "selling value" alone is what the Commissioners have to consider.

Sect. 13 of the Finance Act has no application to cases like the present; the jurisdiction of the Commissioners to assess a sum on the value of the property by way of composition of the duty payable in respect thereof is only exercisable on the application of any person accountable for the duty. The Commissioners have no power to compound except on such request, nor are they justified under this section in interfering with the question of value. They are to assess a sum on the value of the property, which is ascertained otherwise, namely, by a sale in open market. Under sect. 39 of the Succession Duty Act (16 & 17 Vict. c. 51) the Commissioners have, without any request from the party, an absolute power to compound the duty payable upon the succession upon such terms as they shall think fit, when, notwithstanding the directions in the Act as to the mode of ascertaining the value, difficulties arise in doing so. There is no such power given by sect. 13 of the Finance Act.

No invalidity can be shown in the articles of association. Section 14 of the Companies Act, 1862, prescribes the regulations to be included in articles of association. For whose benefit? for that of the shareholders themselves. So long as they do not contravene any section of the Companies Acts or any rule of law, the sole measure of what it is lawful to include in articles of association is what the parties consider to be for their own benefit. No one is bound to become a member; but when he does so, he is bound by the articles to the same extent as if he had become a party to a specialty contract including like provisions, and must, when proposing to sell, serve the transfer notice. In the majority of private companies clauses framed so as to prevent a sale to strangers are to be found, and their validity has never been questioned. The decision of Stuart, V.-C., in *Homfray* v. *Fothergill* (1) is based on the

(1) L. R. 1 Eq. 567.

assumption that such clauses are valid. See also Palmer on Companies, 4th ed., p. 105; *In re Cawley & Co.* (1). The judgment of Farwell, J., in *Borland's Trustee* v. *Steel, Bros., & Co., Limited* (2), is an express decision in our favour.

Under clause 9 the "fair value" at which the right of pre-emption is to be exercised may be varied from time to time. Any duty to exercise this power must have been a duty upon all the members equally. The sum of £100 fixed as the "fair value" was not a sum fixed by interested persons contrary to the interest of Henry Jameson, who was an original shareholder. and continued a consenting party to this agreement until his death; his executors could not complain that the power to increase the "fair value" was not exercised. "Fair" must mean fair to all the members of the Company, having regard to the objects of the Company, one of which was to keep out strangers. The interest of a member about to exercise his right of pre-emption would be that the value of a share should be kept as low as possible, the interest of an intending vendor would be that it should be as high as possible; the common interest required that the "fair value" should be a sum below the market value, so as to give effect to the object of the clauses as to pre-emption. The shareholders originally fixed the "fair value" at £100 unanimously, and admittedly *bonâ fide*, the Finance Act being of a later date. They have subsequently created no change. No one can complain, and the undoubted authority of the Court of Chancery to interfere at the instance of an injured minority with the unconscionable user of their powers by a majority of shareholders in a company has no application to this case.

There is no infringement of the rule against perpetuity, which has always been confined to choses in possession and never extended to choses in action. There is here no tying up of any choses in possession. A shareholder in a company has no title to any part of the assets as such; all the choses in possession are vested, not in the shareholders, but in the separate entity called the company. We are dealing with contractual rights, and the rule against perpetuity has no application to personal contracts: *Borland's Trustee* v. *Steel, Bros., & Co., Limited* (2); *Witham* v.

(1) 42 Ch. D. 209, 231. (2) [1901] 1 Ch. 279.

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Vane; Challis' Real Property, 2nd ed., App., 401; *Walsh* v. *Secretary of State for India* (1).

The Attorney-General, in reply.

Cur. adv. vult.

KENNY, J.:—

Whether we regard the large questions of principle that have been argued, or the amount of Crown duty alleged to be involved, this case is one of the first importance. If the Crown's contention be correct in omnibus, one result at least must follow—that company promoters and their legal advisers will have to revise the views they have hitherto held, and which the public have accepted, as to the form that articles of association can legally assume in cases where it is desired to form what is known as a private limited liability company. A further consequence of our holding with the Crown may be that many private companies now in existence may find that the contract which unites their members is, in its vital part, essentially illegal and incapable of enforcement. Apart from these somewhat grave matters, the amount of duty in controversy in this case is a very considerable one, exceeding, so far as I can see, the sum £16,000.

The object of the suit is to establish liability on the part of the personal estate of the late Mr. Henry Jameson for estate duty payable on certain shares held by him in the firm of John Jameson & Son, Limited. The defendants are Mr. Jameson's executors, and the information asks for a declaration that upon his death estate duty became payable under the provisions of the Finance Act, 1894, on the "principal value,"—estimated as provided by section 7, sub-sect. 5, of the Act—of 750 shares in the firm of John Jameson & Son, Limited, and that such value is not limited to the par or "fair value" of £100 a share, notwithstanding the special provisions as to the "fair value" and as to the alienation of the shares of the Company contained in the articles of association of the latter. There is an alternative prayer, namely, that the Court may determine in what manner the "principal value" of the shares is to be ascertained, and what is the "principal value" for the purpose of the Act. Finally, it asks that the defendants—

(1) 10 H. L. Cas. 367.

the executors—may be ordered to pay the amount of the duty, when so ascertained, to the Commissioners of Inland Revenue.

The phrase "principal value" occurs in the 1st and 7th sections of the Act. The former section provides for the levying and payment of estate duty, and is as follows :—

> "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value, ascertained as hereinafter provided, of all property, real or personal, settled or not settled, which passes on the death of such person, a duty, called 'estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such estate duty."

Section 7, which deals with the ascertainment of the value of property, by its 5th sub-section enacts that—

> "The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased."

It is on the language of this sub-section, in relation to the special circumstances of the present case, that the Crown asks for a determination from this Court.

The answer of the defendants submits that the "principal value" of the 750 shares is for the purpose of estate duty necessarily the same as the aggregate of the "fair value" of each share, viz., £100, as fixed by the articles of association of the Company, inasmuch as if there was a market for the shares they could not, having regard to the articles, have realised more than £100 each, and would not perhaps realise even that sum. This submission is in effect an argumentative denial of the allegation in the 12th paragraph of the information, that the principal value of the shares is much greater than the par or "fair value." It seems to me that this Court is not competent to give an opinion as to the value of these shares. The matter is one for the Commissioners of Inland Revenue themselves, with or without the aid of an expert whose business it is to make such valuations and to calculate the chances in any given state of circumstances. We could not

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possibly say, with the Attorney-General, that these shares, if sold in the open market, would fetch more than £100 each; nor could we say, with the defendants, that they are worth only £100, if they are worth anything at all. All we can do, in my opinion, is to decide the legal points that lie at the threshold of any inquiry as to value, so as to make clear the way for the Commissioners or their expert. As these points have been developed in argument, they raise two questions, namely—(1) the validity of certain non-alienation clauses contained in the articles of association; and (2) the effect of the articles, assuming that they are legal, having regard to the Finance Act, 1894. As to the suggestion of invalidity, one looks in vain to find a trace of it in the information. Indeed, the latter is framed from the point of view of the articles being accepted as valid and binding; and so little weight was attached to the argument based on invalidity, that, in his opening statement, the Attorney-General challenged only the 11th article, which is one of the least offending. In my opinion it is not open to the Crown to raise this point of invalidity; but as it has been so fully discussed, I propose to give my opinion on it. On the second question, the alleged modifying effect of the Finance Act is put forward in the information only inferentially. The submission of the Crown is that the "principal value" of the shares is not *merely* the amount actually paid upon them. In other words, that the value of each share exceeds £100.

The information does not state any specific ground for this contention, save by a general reference to the words of the Finance Act; but the argument at the bar has been, not that the supposititious sale under the 7th section is to be regarded as one in which the thing sold is free from all restrictions on alienation, present and future, as claimed in the letter of the Commissioners dated the 21st April, 1902, but as one in which the executors were to be assumed as now selling to any person they chose, and at any price they could obtain, but subject to the restricting effect of the articles on all subsequent dealings by the purchaser and his successors in title with the shares so sold. If the argument founded on invalidity were to succeed, then the supposititious sale contemplated by the section would be of shares assumed to be absolutely free and unfettered, not alone now, but in all future dealings with them.

The facts of the case are extremely short and simple. The firm of John Jameson & Son, Limited, was incorporated as a company limited by shares, in the month of October, 1891. Its capital was £450,000, divided into 4500 shares of £100 each. The original shareholders to whom this capital was allotted numbered eleven—all of the family and name of Jameson—amongst them being the late Mr. Henry Jameson, to whom was allotted 750 shares, and who retained them up to the time of his death. The dividends on its capital, payable by the Company for some years previously to Mr. Jameson's death, were at the rate of £20 per cent. per annum. Mr. Henry Jameson made his will, dated the 26th July, 1901, whereby he bequeathed his 750 shares (with other property) to his executors on certain trusts, and appointed the defendants executors of his will. Two of these gentlemen are shareholders in the Company, namely, John Jameson and George Jameson. The testator died on the 15th September, 1901, and probate was granted to the three executors, whereupon, without prejudice to any greater liability, they paid estate duty on the basis of the 750 shares, being value for £75,000, and no more. The Company registered in their books as shareholders in respect of the 750 shares only the defendants John Jameson and George Jameson, and the shares are now standing in their names.

The articles of association of the Company are in a great measure identical with, or similar to, those in common use where it is desired by the promoters of a company to keep its shares in the hands of a limited class of persons, and to prevent the intrusion, so far as possible, of members of the general public in the management of its affairs. The provisions of the articles by which it is sought to effect this purpose are set forth in the information. Briefly stated, the scheme is this. With certain exceptions, which it is important to call attention to, no share is to be transferred to a person who is not a member, so long as any member is willing to purchase it at the "fair value" (article 6); and the directors may refuse to register any transfer to a transferee not being already a member, of whom they do not approve (article 20); and any such transfer is to be void (article 23). A shareholder proposing to transfer—and in my opinion this contemplates only the case of a proposed transfer to a non-member who is not a son or brother

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of the proposed transferrer, or a son or brother of some other existing member (article 18)—must give the Company notice of his intention, whereupon the Company is deemed to be his agent for the sale of the share to any member of the Company at the "fair value" (article 7); and if within twenty-eight days a member willing to purchase be found, the selling shareholder, on receiving notice, is to be bound to transfer to such member on payment of the "fair value" (article 8); and if he makes default in transferring, the Company may cause the name of the purchasing member to be entered on the register as the holder of the share (article 10). If a purchasing member be not found within twenty-eight days, the selling shareholder may, within three months, sell and transfer the share to any person (subject to the approval of the directors), and at any price (article 11). In article 16, personal representatives of a deceased member are specially dealt with. They are to be the only persons recognised by the Company as having any title to the shares registered in the name of the deceased member, and, by article 17, a person becoming entitled to a share in consequence of the death of any member may, subject to the approval of the directors, and "subject to the regulations herein contained" transfer same to himself or any other person. At first sight the last-mentioned article would seem to contemplate the right of a personal representative to sell to any member of the public; but the qualifying words, "subject to the regulations herein contained," and a reference to articles 18 and 22, satisfy me that no such unrestricted right was intended to be given. If it were, the power expressly conferred by the 18th article on personal representatives to trsnsfer to the son or brother of the deceased member, or of any existing member, would be surplusage. Furthermore, the 22nd article has a special reference to the power conferred by the 17th of transfer to the person entitled on death, or to any other person, for it confers express authority on the directors, in a case where the person entitled is not already a member, to give him notice that they decline to admit him as a member, whereupon a notice of transfer, such as is provided for in article 7, is to be deemed to have been served.

In the case of bankruptcy the provision against unrestricted sale is still more drastic, for the notice of transfer by the assignees

is to be deemed to have been served as of the date of the bankruptcy. The only remaining article that I need notice is one of the greatest importance—the existence of which has largely contributed, if not indeed given rise, to the present controversy. It deals with the matter of the "fair value" of a share. It will be found on reference to the notes to Mr. Palmer's excellent collection of precedents in Company conveyancing that in the case of private Companies different modes are suggested for the ascertainment of the "fair value" on payment of which shares may be transferred. It might be ascertained by arbitration, or it might be a sum to be fixed by the Company in general meeting in each year, or a sum to be fixed by the auditor, or a sum equal to the amount paid up on the share. This last suggestion is not unlike that put forward in Lindley on Partnership, 6th ed., 430, for the purpose of avoiding a sale on dissolution of an ordinary firm, namely, to specify in the partnership deed a sum at which the share of an outgoing or deceased partner may be taken by his co-partners. In the present case the 9th article provides that the fair value of a share is to be £100, or such other sum as shall from time to time be fixed as the "fair value" by resolution of the Company in general meeting. It does not appear that the fair value was ever altered from the original sum so fixed—the late Mr. Jameson, with his great voting power derived from 750 shares, and his co-members, being apparently satisfied that, notwithstanding the high dividend so stated to have been paid of late years, there was no occasion for an increase in the selling or "fair value." It may be that with trade fluctuations, known only to themselves, they regarded the par value as the "fair value." However that may be, all we know is that the concern was paying £20 per cent. dividend, and that the "fair value" was left at the sum that was fixed in the year 1891.

Before approaching the questions of invalidity and the Finance Act, it will be well to arrive at a conclusion as to what, upon the true construction of the articles of association, and on the assumption that the latter are binding on all members of the Company, is the nature of the restrictions imposed on the right of free alienation of the shares. It is plain from article 6 that a member

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cannot sell and transfer to any member of the public whom he may select, and that the class with whom he may deal is a very restricted one. The prohibition contained in the article is itself limited inasmuch as it applies only "save as hereinafter provided." It seems to me after a very careful reading of the articles that these words refer to (*inter alia*) the sanction given by the 18th article to a transfer by a member or his personal representatives to any son or brother of the former, or of any other member. Such a transfer, though expressly permitted, would be subject to the general approval of the directors. In the view I take it is open to any member and to the personal representatives of any member to sell and transfer without reference to the "fair value" clauses and at a price outside the £100 per share—if vendor and purchaser so agree—to (1) any other existing member; (2) any son or brother of the selling or deceased member; or (3) any son or brother of any other existing member. I think that the procedure for ascertaining whether a member is willing to purchase a share, and for compulsory transfer at the "fair value" to the member when so ascertained, is not applicable to cases of proposed sales to any of the persons I have just indicated. Therefore, within these classes a share can, in my opinion, be sold and transferred at the best price the seller can obtain by agreement. But with the exception of the sons and brothers mentioned in article 18, it is clear to me that no member of the Company can by a voluntary act *inter vivos* force an outsider on the Company so long as any existing member is willing to buy him out at the "fair value." No doubt, he could declare a trust of his shares for an outsider; but if he does so, he remains the registered member, and the purchaser from him has mere equitable rights enforceable against him alone. Such a purchaser in equity could not insist on being registered in the Company's books. Indeed, a question might arise on which it is unnecessary I should give an opinion—whether if the mode of completion of the sale took the form of an actual transfer and not a mere declaration of trust, it would not under article 23 be absolutely void as between the vendor and purchaser. If a member cannot substitute an outsider as a new member in his place by act *inter vivos* against the will of his brother shareholders, I think it is equally clear that on his death his personal representatives

cannot do so. Articles 6, 17, 18, 22, and 23 appear to be decisive on the point.

Now, are these articles of association, so far as they are restrictive of the free right of alienation, invalid and void, and if so, on what ground? The Crown contend that they are so from two points of view; first, that they infringe the rule against perpetuities, and secondly, that they are repugnant to absolute ownership. Both points are covered by authority, which, though but the decision of a Court of first instance, is entitled to the greatest respect. The judgment is that of Farwell, J., in *Borland's Trustee* v. *Steel, Bros., & Co., Limited* (1), and it is a very lucid and able statement of the law in which I venture to express my concurrence. There, as here, there was a private company with articles of association not unlike those in the present case, so far as restrictions on the free disposition of the shares were concerned. There was a limited class who alone could take transfers, and a "fair value" price, which amounted in the aggregate to £8650, while the plaintiffs alleged that the real value was £24,000. The average dividend for seven years had been about £45 per cent., and the general financial position of the Company was sound. Three substantial points were argued—perpetuity, repugnancy, and public policy. The shareholder Borland had become a bankrupt, and it was contended for his trustee that the particular articles were obnoxious to the Bankruptcy Law. On all three points Farwell, J., held with the Company.

In considering whether that case was rightly decided, it is important to bear in mind the character of the property in question. It is not the property of the Company that is subjected to restrictions on alienation. The assets of the Company, its premises, stock in trade, &c., are all capable of being disposed of without limitation or fetter of any sort. No shareholder has a right to any specific portion of the Company's property, and save by, and to the extent of, his voting power at a general meeting of the Company, cannot curtail the free and proper disposition of it. He is entitled to a share of the Company's capital and profits, the former, in the words of Farwell, J., being measured by a sum of

(1) [1901] 1 Ch. 279.

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money which is taken as the standard for the ascertainment of his share of the profits. If the Company disposes of its assets, or if the latter be realised in a liquidation, he has a right to a proportion of the amount received after the discharge of the Company's debts and liabilities. In acquiring these rights—that is, in becoming a member of the Company—he is deemed to have simultaneously entered into a contract under seal to conform to the regulations contained in the articles of association (Companies Act, 1862, sect. 16). Whatever obligations are contained in these articles, he accepts the ownership of the shares and the position of a member of the Company, bound and controlled by them. He cannot divorce his money interest, whatever it may amount to, from these obligations. They are inseparable incidents attached to his rights, and the idea of a share cannot, in my judgment, be complete without their inclusion. This was the view taken by Farwell, J., whose language was adopted by FitzGibbon, L.J., in *Casey* v. *Bentley* (1). He could not, nor could his personal representatives, retain the mere money interest and repudiate the contracts entered into in connexion with it. The money interest and the contractual obligations form one whole, and no member could be heard to say that he had a right to retain the former and disclaim the latter. But even if the Crown, for the purpose of the supposititious sale under the Finance Act, could be so heard, I am of opinion, with Farwell, J., that there is no remoteness and no repugnancy. There is no interest in land, legal or equitable, vested in the defendants by reason of their testator's membership in their company. His property in the Company was represented by contractual rights that created no such interest, and if so, the restrictive clauses are not obnoxious to the rule against perpetuities: *London & South-Western Railway Co.* v. *Gomm* (2). As to repugnancy, the invalidity must arise either from the creation of a limited class of permissible transferees, or from the nature of the pre-emption price or "fair value." There is no suggestion that the articles were framed with any indirect purpose, or that the promoters had any object unless the perfectly *bonâ fide* one of retaining, as far as possible, the management of the concern in

(1) [190 1 I. R. at p. 393.

(2) 20 Ch. D. 562.

the family of Jameson. Suppose it was provided that the "fair value" was to be such a sum as might be settled by two arbitrators to be appointed by the Company and a selling member, with liberty to them to call in an umpire—or that it was to be taken as a capital sum to be arrived at on the basis of £100 for every £5 per cent. of dividend paid for the preceding three years, would the fact that only a limited class could purchase, be any objection? I think we must consider the question of limited class by itself, and on the assumption that the "fair value" means a price to which no objection could be urged. If so, how is the selling shareholder prejudiced? How is the restriction opposed to his just rights? Unless it could be successfully contended that all pre-emption powers are nugatory, I can see no difference between giving the right to one individual and giving it to several. There is nothing to prevent a man from agreeing for a purchase of property, and giving a right of pre-emption as part of his contract. How does such a case differ from the present, unless that here the right is given to several? The circumstances are wholly different from those in which there is a grant or devise of property in terms conferring absolute ownership followed by a defeasance in derogation of the natural incidents of the estate which had been already conferred. In the present case there is no absolute estate, right, or interest, conferred, the natural incidents of which are subsequently fettered. The thing acquired by membership in the Company is, from its initial stage, a restricted and fettered thing. It never had attached to it any rights of free alienation which were sought to be affected. I cannot but think that such cases as those of *Attwater* v. *Attwater* (1), *In re Rosher* (2), and *Dugdale* v. *Dugdale* (3), where a condition was held to be repugnant, resulted in a complete defeat of the plain intention of the testator in each case; where if he had used slightly different language, he would have effectually carried out his wishes. I think that this class of case cannot be applied to the present, where the share is the creature of a special contract, and no natural or inherent right is derogated from.

Coming now to the other alleged ground for the contention of

(1) 18 Beav. 330. (2) 26 Ch. D. 801. (3) 38 Ch. D. 176.

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repugnancy, namely, the amount of the pre-emption price, or "fair value," I shall assume, for the sake of argument, that each share was worth much more than £100 at the time of Henry Jameson's death. There is no absolute prohibition against alienation. If I am right in my construction of the articles of association, the share may be sold in one state of circumstances for as much as the parties may agree upon. In another state of circumstances the "fair value" may have to be accepted. It seems to me that the reasons I have given for holding there is no repugnancy in the restriction of alienation to a class, apply equally to the contention based on the "fair value" price. Was the creation of a price other than an open market price invalid? In the case of an ordinary partnership a provision to that effect is valid: Lindley on Partnerships, citing *Essex* v. *Essex* (1), a case that met with the approval of Fry, J., in *Cox* v. *Willoughby* (2). If so, I would think that the case is an *a fortiori* one, when it assumes the form of a clause in articles of association. But then, if there is no absolute legal prohibition against a "fair value" price, where are we to draw the line when the question is only one of amount? I confess I am wholly unable to say whether in the circumstances £100 per share is an unfair price. There was power in the articles to alter it by resolution in general meeting: no such resolution was ever passed. For aught I know, there may have been low dividends in the years before the £20 per cent. was paid, or there may have been circumstances connected with the Company's trading that may have led this body of business men to the conclusion that the time had not come for a revision of article 9. What is admitted is, that the testator had an immense interest in the share capital of the Company, with a proportionate voting power; that John Jameson, one of the directors, had at least in 1891 a corresponding interest, and that both of them—to say nothing of the other members with smaller interests—appear to have rested satisfied with the par value as the "fair value."

I therefore think that the contention of the Crown wholly fails so far as it attacks the validity of the articles of association.

The remaining question is with reference to the effect of the

(1) 20 Beav. 442. (2) 13 Ch. D. 863.

Finance Act of 1894. Estate duty is to be paid upon the "principal value" of all property which passes on death (section 1), and that "principal value" is to be ascertained as thereinafter provided, namely, by the price which in the opinion of the Commissioners such property would fetch if sold in the open market at the time of the death of the deceased (section 7, sub-sect. 5). Before considering the true meaning of this sub-section, it is very important to keep before one's mind that we are not in this case dealing with all property that "passed" on the death of the deceased. The information is conversant only with the personal property which the deceased was competent to dispose of at his death, on which alone the defendants as his executors are compellable to pay estate duty pursuant to the Act (sect. 6, sect. 8 (3)). Other property may have passed on his death; but unless the deceased was competent to dispose of it, the executors are under no liability to pay duty on it, though it is permissible to them to do so if they so desired (section 6 (2)). In dealing with those shares, it therefore becomes necessary to inquire what is the nature—firstly, of the subject-matter that passed on the death and of which the deceased was competent to dispose; and secondly, of the supposititious sale under the 5th sub-section of the 7th section of the Act. I do not propose on this branch of the case to repeat the considerations that influenced me on the question of repugnancy in arriving at the conclusion that the interest of the deceased in the Company was one in which, from its very creation, the elements of free and uncontrolled disposition were absent. Compared with the absolute right to go into the open market and sell to any outsider and for the best price property that was subject to no restrictions on alienation present or future—this interest was what I may venture to call a dwarfed and stunted thing. But it, and it alone, was what the deceased had power to dispose of in his lifetime, and which his executors were competent to sell and transfer after his death. How, then, does the Finance Act operate on such a subject-matter? I cannot help expressing my surprise that this question of the value of shares in a private company never presented itself before 1894. For probate and residuary account purposes the ascertainment of the market value would seem to have been just as necessary before as after the Act. Are we now to say that for the purposes

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of levying estate duty the executors are to be supposed to have in their possession a marketable commodity affected by less restrictions than it was subject to in the hands of their testator? The Crown argument goes to this, that there cannot be such a supposititious sale as is contemplated by the 5th sub-section unless we proceed on the basis of a sale to any member of the public, and thus permit, by assumption, an evasion of the 18th article of association which would be forbidden in the actual working of the Company; and, in the administration of the estate of the testator, could not be effected. I cannot think that the Legislature contemplated such a metamorphosis of the incidents of the particular property by the use of the words "if sold in the open market." Suppose the property was a leasehold with a condition against alienation unless to certain persons, or subject to a pre-emption right in a third person which was to come into existence on the death of the party whose estate was under consideration, could it be said, in the first case, that a valuation was to be made on the assumption that the property might be sold to anyone; and, in the second case, on the assumption that the pre-emption price was to be disregarded? If so, it might turn out in both cases that the actual benefit to the estate of the deceased would be much less than the amount of the valuation placed on the estate by the Commissioners. Surely such a state of things was never contemplated. It may be that a case like the present was not present to the minds of the framers of the Act, and is unprovided for. However that may be, we are bound, in the case of a statute imposing a tax, to adopt a construction favourable to the subject, unless it is clear that he comes within the letter of the law. This rule is forcibly expressed by Lord Cairns in *Partington* v. *The Attorney-General* (1), and by Lord Blackburn in *The Oriental Bank Corporation* v. *Wright* (2), where he says that "The intention to charge the subject must be shown by clear and unambiguous language."

Applying this principle, I am of opinion that, putting it at the lowest, there is no sufficient language in the section to support the Crown contention, which, in the words of Mr. Ronan, suggests a supposititious sale of a class of property different from that which

(1) L. R. 4 H. L. 100. (2) 5 A. C. 842.

Mr. Jameson possessed. I am consequently of opinion that the assumed sale in the section must be regarded as one not capable of being made to any member of the public unrestrictedly, but, on the contrary, a sale subject to the provisions in articles Nos. 18, 6, 7, 8, 9, 10, and 11 of the articles of association.

I wish to add that I quite appreciated the force of the Attorney-General's argument that if the defendants' contention be right the Crown might, in every case like the present, be deprived of the duty on so much of the property passing on the death as would not benefit the estate of the deceased, inasmuch as in a case like the present the duty on the difference between the valuations on a free and on a restricted sale does not appear to be capable of being levied from anyone. The case is, I think, analogous to that which I have already put of a leasehold with a condition against alienation or subject to a right of pre-emption. The leasehold without any restriction on alienation may be worth a considerable sum. Supposing that a sale by executors be not prohibited, but the fetter is to re-attach in the hands of the purchaser from them, it is obvious that the premises will not be worth as much as in the former case. The right of free sale must have a money value. To whom in these circumstances does the difference between the two values pass, and how can duty be levied on it at all? In the case of a pre-emption right, is duty to be payable on the difference between the pre-emption price and the actual unrestricted selling value, and if so, by whom? I do not think we are called on to answer this question, as the subject-matter of the present information is merely the amount of the estate duty payable on what the deceased was competent to dispose of.

The result of the conclusions I have arrived at is, that while the principal value ought to be ascertained having regard to the articles of association, it does not at all follow that such principal value might not, in the opinion of an expert, exceed the par or "fair value" of £100. The possibility of a sale by private agreement at a higher price to a member of the limited class of permissible transferees; the payment of the large dividend; the position, stability, and character of the Company; the special pre-emption rights attaching to the ownership of the shares, would all be, in my opinion, elements in the estimation of a price, before the obli-

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gation to accept par value came into operation. I therefore think that the Attorney-General is entitled to a declaration as to the manner in which the principal value is to be ascertained, having regard to the articles of association, and the 7th section of the Act, and that the form of our judgment should be as follows:—

> "THE COURT doth declare that the principal value of the shares in John Jameson & Son, Limited, to which Henry Jameson was entitled at the time of his death, is to be estimated at the price which the same would, in the opinion of the Commissioners, fetch if sold in the open market at the time of such death; and that, in estimating such 'principal value,' regard is to be had to the special provisions in the articles of association with reference to alienation and transfer of the shares of the Company, and as to 'fair value'; but that the amount of such principal value is not necessarily limited to the par or 'fair value' of £100 a share."

The Crown has failed, in my opinion, on the main and substantial contentions before us, viz., the validity and construction of the articles of association, and the interpretation of the Finance Act; and I think they should pay the defendants' costs.

BOYD, J.:—

The firm of John Jameson & Son has been in existence for a great many years, and was conducted as a private concern until the year 1891. In that year it was converted into what is popularly known as a Family Company, under the Companies Acts, in pursuance of an agreement dated the 15th September, 1891. This agreement was the basis of the arrangement embodied in the articles of association, and all the members of the firm were parties thereto and bound thereby. The articles of association, prepared in accordance with the said agreement, set forth in detail the terms on which the Company was formed, and each member of the old firm, which had consisted of eleven gentlemen named Jameson, signed same and agreed to conform thereto. Article 4 provides for the appropriation of the shares amongst the several members of the firm. Article 6 provides for the transfer and transmission of such shares, and expressly states that "no share shall, save as hereinafter provided, be transferred to a person who is not a member so long as any member is willing to purchase the

same at the fair value"; and article 8 provides that any retiring member "shall *be bound* to transfer the share to the purchasing member." The *fair* value of a share is fixed by the 9th article at "£100 or such other sum as shall from time to time be fixed as the fair value by resolution of the Company in general meeting."

There has been no resolution of the Company altering the fair value, so we must assume that all the members were willing to continue to be bound by the fair value originally fixed.

At the time it was arranged to convert the partnership of John Jameson & Son, then existing, into a joint stock company, every member of the firm had complete dominion and control over all the rights he possessed in the partnership, and it was competent for him to enter into any agreement he thought fit with the other members. All the members apparently agreed that it was desirable that the fair value of the shares allotted to each of the old members should be fixed by the articles, and that such restrictions should be imposed by the articles as would, so far as possible, prevent outsiders being enabled to become members of the Company, and accordingly such restrictions are imposed by articles 6 to 28. The entire capital of the Company was £450,000, and the par value was fixed as the fair value of each share, and it is not alleged there was any fraud or sinister purpose in so fixing it.

Henry Jameson, one of the parties who signed the said articles of association, was allotted, by the said articles, 750 of the 4500 shares into which the capital of the Company was divided. He died on 15th September, 1901, and the question raised by the information in this case is as to the amount at which the said shares should be valued for the purposes of estate duty. The Attorney-General has contended that under the Finance Act, 1894, the principal value of the shares so held by Henry Jameson is "to be estimated to be the price which such property would fetch if sold in the open market at the time of the death of the deceased," and that if these shares were sold in the open market, they would sell for very much more than the sum fixed as the fair value. He also contended that the articles of association of the Company as to the transmission and transfer of the shares are void as being repugnant to absolute ownership, or as tending to perpetuity, and that the fair value of a share as fixed by the articles is not the principal

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value as defined by the Finance Act. He relied on the fact which is admitted by the defendants, that for some years prior to the death of Mr. Jameson, and at the time of his death, 20 per cent. dividends were paid on said shares.

There is no evidence as to the rate of interest received by the members prior to the incorporation.

Sect. 1 of the Finance Act, 1894, enacts that estate duty shall be levied and paid upon the principal value of all property *which passes* upon the death of a person. Sect. 2 (*a*) provides that property *passing* on the death of the deceased shall be deemed to include property of which the deceased was at the time of his death *competent* to dispose. Sect. 6, sub-sect. 2, provides that "the executor of the deceased shall pay the estate duty in respect of all personal property of which the deceased was competent to dispose at his death on delivering the Inland Revenue affidavit, and may pay in like manner the estate duty in respect of any other property passing on such death which by virtue of any testamentary disposition of the deceased is under the control of the executor, or in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment." Sect. 7, sub-sect. 5, provides that "the principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased."

It is manifest from these provisions that the property in the shares held by Mr. Henry Jameson, of which he was at the time of his death competent to dispose, or which was under the control of his executors, was merely the property he had in the shares subject to the restrictions and conditions imposed thereon by the articles of association, and that his executors, under sect. 6, are only liable to pay duty on such property subject to such restrictions and conditions. The question, then, in this case is, what is the principal value of such property if sold in the open market fettered with these restrictions and conditions.

In my opinion, sect. 7, sub-sect. 5, merely provides for ascertaining the principal value of the property which passed to the executors, as it is not alleged that any other persons accountable

for the duty, if there be such, have requested the executors to pay anything for them.

In the case of *Borland's Trustee* v. *Steel, Bros., & Co.* (1), which was a case in many respects similar to the present, Mr. Justice Farwell decided against the views contended for by the Attorney-General in this case. That was a case in which the transmission of the shares arose upon the bankruptcy of the shareholder. Upon an adjudication in bankruptcy, all the estate of the debtor vests in his trustee or assignees. The articles of association contained restrictive clauses practically similar to those in the present case, and also contained a clause (article 53) fixing the fair price of a share at the par value thereof, as in this case, which was £100. The interest for a period of seven years paid on the shares averaged about 45 per cent. It was argued in that case that shares which were receiving such dividends were of far greater value than the par value. In his judgment, at page 291, Mr. Justice Farwell states his opinion on this point as follows:—"These shares can have no value ascertainable by any ordinary rules, because, having held as I do that the restrictive clauses are good, it is impossible to find a market value. There is no quotation. It is impossible, therefore, for anyone to arrive at any actual figure as to which it may be said to be clear that that is the value, or something within a few pounds of the value." This case was quoted in the arguments in the case of *Casey* v. *Bentley* (2), and referred to with approval by Fitz Gibbon, L.J., in his judgment at p. 393. I entirely agree with the judgment of Mr. Justice Farwell, which I am of opinion governs and decides all the points in this case. By the death of Mr. Jameson, nothing passed to his executors, except what he himself possessed. Had Mr. Jameson desired during his lifetime to sell his shares, he could not have claimed the right to sell them at a greater price than the fair value fixed by the articles of association. This price and the restrictive clauses were as much terms of his contract as his title to the shares. His title was clogged with these clauses, and he accepted the shares which were *allotted* to him (see article 4) on the terms and conditions agreed to by him and the other shareholders. On his death nothing more

(1) [1901] 1 Ch. 279. (2) [1902] 1 I. R. 376.

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passed to his executors than he had. With the restrictive conditions in the articles by which a purchaser of his shares would be bound if sold in the open market, it would be folly on the part of such purchaser to give even the par value, as he could not have the shares transferred to him in the books of the Company, or registered in his name, or receive dividends thereon.

We know, from our experience of what has befallen several well-known distilleries in this city, which for long years produced large profits for their proprietors, how uncertain and fluctuating are the profits of this business; and I do not think much stress can be laid on the fact of the dividends which have for some years been paid by the company in this case as being any test of the value of the shares. No doubt the members knew and considered this fact when they fixed the fair value of a share at £100.

Family and private joint stock companies, with restrictive clauses similar to those in this case, have been in existence long prior to the Finance Act of 1894, and the Company of John Jameson & Son, Limited, was itself incorporated in 1891, three years before the passing of the Act. These companies are most useful and beneficial to traders; and if it were intended that the provisions in their articles of association as to fair value should be controlled and subject to the construction sought to be placed on the "principal value" as defined in the Finance Act, 1894, I think it should have been done in clear and unambiguous language. In the case of *Partington* v. *The Attorney-General* (1), Lord Cairns, in his judgment (page 122), states:—"I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a

(1) L. R. 4 H. L. 100.

taxing statute, where you can simply adhere to the words of the statute."

In *The Oriental Bank Corporation* v. *Wright* (1), the same principle is laid down and acted on. In his judgment, at page 856, Lord Blackburn states :—"Their Lordships, therefore, having regard to the rule that the intention to impose a charge on the subject must be shown by clear and unambiguous language, are unable to say that the obligation of the Bank to make the return applied for, and its consequent liability to pay duty on the notes put into circulation by its Kimberley Branch, are so clearly and explicitly imposed by the present Act as to satisfy this rule." In that case the language of the Act was stronger against the Bank than the language of the Finance Act is against the defendants in the present case.

Since the passing of the Finance Act in 1894, the Crown has never, so far as I know, or as appears from the Law Reports, taken any proceedings to establish the rights claimed in the present case. We have been strongly pressed in the arguments for the Crown in this case with the results which may ensue if we decide against the contention of the Crown. I shall only refer to another portion of Lord Blackburn's judgment in the Oriental Bank case, in which he says, in reference to a similar argument in that case: "But if the Legislature, from want of foresight, or for any other reason, has omitted to provide for such a case, it is the province of the Legislature itself, and not of the Courts, to supply the omission."

The Crown, in effect, asks us to add to section 7, sub-section 5, some such words as the following, "freed from any agreement or restrictive conditions affecting such property or the sale or transmission thereof." This we cannot do. It is the province of the Legislature.

I have had the advantage of reading the judgment of my brother Kenny; and as I entirely agree with him in the conclusions at which he has arrived, I do not consider it necessary for me to go further into the facts or arguments than I have done.

We are not in a position to say what is the principal value of the late Mr. Jameson's shares, as we are asked to do by the infor-

(1) 5 A. C. 842.

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mation: the duty to do so is imposed upon the Commissioners, and they have not discharged that duty.

I am of opinion that the defendants are entitled to our judgment in their favour.

PALLES, C.B.:—

I am unable to agree in the view which my learned colleagues take of the question involved here.

I am of opinion that the Attorney-General is entitled to judgment in the terms of the first alternative of the prayer of the information, viz., that the "principal value" of the shares is the price which they would have fetched if sold in the open market at the time of the death, and that such value is not limited to the par value of £100 a share, notwithstanding the special provisions contained in the articles of association. I am further of opinion that he is entitled to a declaration that the price should be that which, in the opinion of the Commissioners, would have been fetched if the sale in the open market were upon the terms that the purchaser thereat should be entitled to be, and should be, registered as a member of the Company in respect of the purchased shares.

The substance of the argument for the defendant was that the executors were, on the death of the deceased, under an enforceable obligation to sell the shares at £100 each, and that this obligation ascertained and fixed their *maximum* value for the purposes of the Finance Act. During the argument I asked Mr. Ronan whether he contended that the provisions in the articles amounted to, or contained, "a *bonâ fide* contract of purchase of the shares from the deceased for full consideration in money or money's worth, paid to him for his own use or benefit," within sect. 3 of the Finance Act; or that the case was otherwise within that section. He replied that he did not; and, consequently, I leave this 3rd section out of consideration altogether.

This being so, were it not for the elaborate and lengthened arguments that have been addressed to us (some of which have found acceptance with my learned brethren), I should have thought the question capable of an easy and simple solution. I should have thought that as the entire property, legal and equit-

able, in the shares, which produced £15,000 a year, was vested in the deceased as a member of the Company, those shares were part of the property which "passed" on his death; and having regard to the exclusion of the 3rd section, I should have deemed it immaterial, for the purposes of the Finance Act, to inquire to whom they had so "passed." Assuming the provisions in the articles to have been valid and enforceable, I should have held that the value of such shares, subject to the right of pre-emption, was properly within sect. 1 of the Act, and that the residue of the shares—in other words, so much of them as was of a value equivalent to that of the right of pre-emption—was properly within sect. 2, sub-sect. (*b*), being property in which the deceased had an interest ceasing on his death, "in respect of which a benefit accrued or arose by the cesser of such interest," and which therefore was to be "deemed to pass." The question then would have seemed to me to have reduced itself to one of valuation.

Now, the value, we know, by sect. 7, sub-sect. 5, is "the price which, in the opinion of the Commissioners," the shares "would fetch *if* sold in the open market at the time of the death." The sale here supposed should, I would have thought, be a sale of the *property* which the deceased had in the shares at the time of his death—that is, of the entire legal and equitable interest therein, of that interest by virtue of which the deceased had been, and had been entitled to be, "a member" of the Company in respect of such shares; a sale by virtue of which the purchaser thereat would have been entitled to have had that which he had bought vested in him in the same manner as it had been vested in the deceased, and consequently under which he would be entitled to be registered as a member of the Company in respect of those shares. If this view be right, the case of the defendants would, admittedly, fail.

Having regard, however, to the difference of opinion amongst us, I would not deem it courteous to express my opinion so summarily, and I accordingly proceed to give, in some greater detail, my views upon the principal points of difference between me and my learned brethren, although I doubt whether by so doing I add any force to what I have already said.

The vital difference between us appears to be the subject-matter

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upon which the Crown are, upon this information, entitled to recover duty. My learned brethren hold that that subject-matter is not *all* the property in the shares which passed upon the death, but is limited to the portion of that property "of which the deceased was competent to dispose at his death," being the portion in respect of which the executors are the persons who, under sect. 6, sub-sect. 2, are primarily liable to duty. I, on the other hand, hold that the subject-matter is the entire property in such shares, including therein as well that portion thereof which might have passed under the articles to "purchasing members," as the residue which passed by his will.

There are, I think, two answers to the views of my colleagues upon this point. First, inasmuch as the shares have since the death been actually transferred to, and are now vested in, *two* of the executors who are also two of the defendants, those two defendants are liable to the duty on the entire value of them, under sect. 8, sub-sect. 4. The information, in paragraph 10, states facts sufficient to raise this ground of liability, and the difference between the liability of two of the defendants as distinguished from that of the three, especially when not raised by the answer, is too fine in a suit such as the present, which has been brought and has been argued upon broad questions of liability, and which ought not to be disposed of on questions of pleading or parties, if indeed the mere fact of the shares having become so vested is not sufficient to show that the right of pre-emption, if it ever existed, was not exercised, so that the entire interest in the shares passed by the will.

But, secondly, the sum at which the principal value is to be estimated is the price which, "*in the opinion of the Commissioners*," would be fetched at a sale supposed to have been effected under particular circumstances; and, surely, if there be a difficulty, as there is, as to the nature of that supposed sale, the Crown is entitled to come into this Court and ask us to make such declaration as to the true nature of the sale, to be supposed under the circumstances of this case, as will enable the Commissioners to perform their statutory duty to the Crown. The personal non-liability of one or more of the defendants cannot affect the declarations asked for in the first paragraph of the prayer.

This difference between us appears to pervade the application to the circumstances of the case of the expression "such property" in the first sentence of sect. 7, sub-sect. 5:—

> "The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, *such property* would fetch if sold in the open market at the time of the death of the deceased."

"Such property" plainly means the property which "passed," or is to be "deemed to have passed," on the death; and in the present case, as the deceased had the entire interest, legal and equitable, in the shares, that interest is the property which answers the description of *such property* in sub-sect. 5, and which is to be the subject-matter of the supposed sale.

The judgment of my learned brothers is based on the assumption that this property is identical with that which, under the articles of association, the so-called "purchasing member" would have acquired by a compulsory transfer on payment of £100 a share, had that compulsory transfer in fact taken place. If this assumption is erroneous, the entire basis of their reasoning fails; because, if that which is the subject-matter of the compulsory sale for £100 is not identical with that which passed at the death, you cannot measure, as they have done, the value of the latter by the price of the former. Now, in my opinion, this assumption is erroneous. Nothing could have passed under such a compulsory transfer which was not in the executors, as such, at the time of the transfer; and assuming, as I do in this part of my judgment, that the articles are valid, it is clear that, on their true construction, something less than the entire legal and equitable property in a share is vested in the executors of a member, until the persons entitled decline to avail themselves of their right to insist on a compulsory transfer.

In the first place, admittedly the legal estate in a share cannot be vested in an executor until such executor is registered as a member; and such registration, if it at all takes place, must necessarily be subsequent to the election not to insist on a compulsory transfer. This is the first broad ground of distinction between two entities which have been treated as identical.

But, further, the equitable interests are not identical. The

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deceased had, as I have said, on his death, the entire of the interest. What equitable interest do the articles of association contemplate the executors of a deceased member as having prior to a compulsory transfer? This very clearly appears from such of the articles as have been referred to by Kenny, J.; but as I desire this judgment to be self-contained, I shall myself refer to such of them as I deem material.

The rights of the executors of a deceased member are declared by clauses 16 and 17. By clause 16:—

> "The executors or administrators of a deceased member . . . shall be the only persons recognised by the Company as having title to the shares registered in the name of such member."

By clause 17:—

> "Any person becoming entitled to a share in consequence of the death of any member, upon producing such evidence that he sustains the character in which he proposes to act under this clause, or of his title, as the directors think sufficient, may, *subject to the regulations herein contained*, transfer such share to himself or to any other person."

Thus the right of the executors to transfer the shares to themselves, or to any other person, is subject to the regulations in the articles. But one of those regulations is contained in clause 6, which provides that, save as thereinafter mentioned (a qualification which, for the purpose of this judgment, is immaterial, as it excepts only transfers to a son or brother of a deceased member):

> "No share . . . shall be transferred to a person who is not a member, as long as any member is willing to purchase the same at the fair value."

To give effect to this provision, clause 7 provides that—

> "The person, whether a member of the Company or not, proposing to transfer the same, shall give a notice to the Company called a transfer notice."

This notice, it is contended—and, for the present, I assume—places the person who gives it under an obligation to sell the share to a member at what is euphemistically called "the fair value"—a value which, by clause 9, was, at the death of the deceased, £100.

Clause 20 empowers the directors to—

> "Refuse to register the transfer of a share . . . to a transferee, not being already a member, of whom they do not approve."

Then, clause 22 provides for the case of—

> "Any person, not being already a member, becoming *entitled*, either on producing evidence that he sustains any particular character, or without producing such evidence, to transfer a share to himself, either alone or in conjunction with another person, whether already a member or not."

That is, it provides for a class of cases which includes that of the executors of a member satisfying the directors that they are executors, and consequently includes this case. What is the provision for such a case?

> "The directors may give notice to such person that they decline to admit him as a member, and thereupon the Company shall be deemed to have been served with a transfer notice in respect of such share."

In other words, the executors shall be bound to sell at what is called the "fair value."

Ultimately, clause 23 declares void a transfer made to any person, not being already a member, of whom the directors shall not approve.

Thus, the right of an executor under clause 17 to transfer his testator's shares to himself or any other person is, by the operation of the other clauses I have referred to, subjected to an obligation of compulsory sale to some existing member at £100 a share, at least if there is no existing member, or any son or brother of a member, willing to purchase otherwise than under the provisions of the articles. The right of the executors to transfer, subject to this obligation of compulsory sale, is the only right or interest to or in the shares of their testator which, under the articles, remains in them; and this right or interest is plainly not the entire equitable interest in the shares—indeed, under the existing circumstances of the Company, probably it is not more than one-third, and possibly is not more than one-fifth, of the entire equitable interest. To me, however, the amount of the difference in value between the whole and the part is immaterial.

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It is sufficient that it is part only, and not the entire, of the equitable interest.

This argument may be stated more tersely thus. That which passed, or is to be deemed to have passed, at the death, is the entire estate in the shares; that which is the subject of the compulsory sale is the equitable interest therein, subject to the right of pre-emption. The difference in value between the two subject-matters is the value of the right of pre-emption.

Mr. Ronan treated these two properties—the entire and the part only of the equitable interest—as the same thing, but attributed to that one thing different values at different times, calling the value of the former "the holding value," and that of the other "the selling value." I deem the distinction to be a very different one. I deem it to be a distinction, not between the value in two different aspects, or at two different times, of the same one thing, but between two different properties—a whole and a part—each having necessarily a different value. But however this may be, the deceased had at the time of his death the entire legal and equitable interest in the shares; and as it is admitted that the case is not within sect. 3; and treating, as I must do, that which the Legislature has said shall be "deemed to have passed" as having in fact passed, I cannot see any answer to the argument of the Crown that the entire equitable interest passed at the death within the meaning of the Act. Nor, having regard to that admission, can I see the materiality, for the purposes of the Act, of the fact that the equitable interest which so passed consisted in part of a right of pre-emption, so that, in the event of that right being exercised, part of that equitable interest would have passed under the will to the executors, and the other part under the articles to purchasing members. That right of pre-emption either was or was not a valuable thing. Had it been of no value, then, in substance, the entire of the equitable interest would have passed by the will, and the rights of the parties and of the Crown would have been the same as if such right of pre-emption had not existed. Upon the other hand, if the right of pre-emption were a thing of value, then so much of the equitable interest in the shares as consisted of that right of pre-emption passed to the member who, under the articles, would be entitled to purchase, and that

interest is within sect. 2, and to be deemed to have "passed at the death," the residue only of the equitable interest passing by the will, and being within sect. 1. But, in respect of the Finance Act, in a case such as the present, which is outside sect. 3, the question is, not *to whom* the property passed, but whether it *passed at all.* It is immaterial whether it passed by act *inter vivos* or by will, whether it passed under the articles of association to other members of the Company, to legatees, or to strangers. The question is, What passed, or is to be deemed to have passed? And on everything within that description duty is payable. At the moment of his death the testator had in him property producing £15,000 a year. Upon his death that property necessarily ceased to be in him, and passed to some person or persons. By what machinery it passed I care not. What value the parties put upon it in their dealings *inter se* I care not. I hold that duty must be paid on the entire of it, irrespective of these accidental circumstances, and must be paid upon its value, as ascertained in accordance with the Act.

This brings me again to the valuation provision. By sect. 7, sub-sect. 5, the "principal value of any property shall be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased." I hold, as I have already said, that "such property" there includes the entire property in the shares which were vested in the deceased at the moment of his death; and that, for the purpose of ascertaining the value, the question is not whether it is capable of being sold in the open market. If the articles of association are valid, these shares are not saleable in the open market; but under sub-sect. 5 we are bound to assume that they are capable of being so sold, because the valuation is to be based, not upon an actual, but upon a *supposed* sale, and that supposed sale one in the open market. The question is, assuming that they were capable of being sold in the open market, what would they fetch on such sale? And upon this supposition, which is the supposition the statute directs us to make, we must exclude the consideration of such provisions in the articles of association as would prevent a purchaser at the sale from becoming a member of the Company, registered as such in respect of the shares purchased by him at such

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supposed sale. If we do not, we do not give effect to the assumption the statute coerces us to make.

I trust that this detailed statement of my views has made clear that which I stated in a few sentences at the commencement of my judgment. It is a vital difference between my view and that of my brethren.

There is, however, another difference between us; and although, in my opinion, it does not affect the result, I prefer not to allow it to pass unnoticed. I understand my learned brothers to consider the provisions affecting the transferability of a share to be *inherent* in the nature of a share in this Company, as now constituted, in the same manner as would be conditions in a lease entitling the landlord to re-enter in specified events upon payment to the tenant of a stipulated sum as compensation. I confess I cannot so regard them. I am of opinion that these provisions are collateral to the shares, and that the character and nature of a share in this Company is identical with that which it would have been had the articles not contained those clauses. The essential nature of a share in this Company is regulated by its memorandum of association. The Companies Act, 1862, section 8, requires the memorandum to contain—(*a*) the amount of the capital with which the Company proposes to be registered, divided into shares of a certain fixed amount. Thus, it is of the essence of a share that it is the *entire property* in an aliquot part of the capital. No doubt a member may, by agreement, deal with his share in such a manner as to reduce *his* equitable interest in the share to something less than the entire, *e.g.* to a life estate; or he may so bind himself that, on a particular event, or on a concurrence of events, he will divest himself of the entire of his equitable interest therein, either with or without his legal interest. But notwithstanding all this, a share in this Company will continue—must continue—to be the entire property in an aliquot part of the capital.

Again, under the statute a share must be a *fixed* amount of the capital; and this provision admits of no qualification. If you frame a memorandum in such a way as to violate that provision of the Act, it is an illegal memorandum, and insufficient to constitute a Company. For example, suppose a memorandum of association provided that a share should be a fixed amount of the capital, say

£100 (the one-thousandth part of an entire capital of £100,000), subject to this, that if the member in whom it was vested died or assigned the share, such share should shrink to and become (say) the one two-thousandth part of the capital of the Company, and that the other two-thousandth part of the capital thus taken from the share in question should be added in designated portions to, and become parts of, other shares, such a memorandum would, in my opinion, be void and illegal, and inoperative in law to constitute a Company. Thus I hold that it is impossible to contend that these shares are such that, *proprio vigore* and automatically, they shrink to one-third or one-fifth of their former value on the death of the holder, or upon his assignment, and resume their former value upon a new member being registered in respect of them. This result, if it takes place at all, does so, not by reason of the nature of the share, but by reason of the collateral agreement affecting it contained in the articles—articles, it is to be remembered, which are capable of variation—and articles the provisions of which, *quoad* the matter here in controversy, I hold to have no greater effect than would an agreement to the same effect between the same parties, not contained in the articles. I am of opinion that all matters resting upon collateral agreement, as distinct from those arising from the nature of the property itself, are immaterial in questions arising on the Finance Act, where sect. 3 does not come into operation.

So far I have assumed the provisions affecting the transferability of these shares contained in the articles of association to be valid, and enforceable at the suit of the member designated by the articles as "the purchasing member"; and as I am of opinion that even on this assumption the Crown is entitled to the judgment for which it asks, it is immaterial for me to consider whether these provisions are so enforceable. Upon this question, which, in my opinion, involves grave and difficult questions (and which, possibly, as my brothers suggest, is not open for consideration upon the information), I shall not enter. I desire, therefore, to be understood as not offering any opinion upon the decision of Mr. Justice Farwell in *Borland's Trustee* v. *Steel, Bros., & Co., Ltd.* (1),

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which has been so much relied upon, or upon its bearing upon the question for decision here.

Solicitor for the informant: *The Solicitor of Inland Revenue.*
Solicitors for the defendants: *Read & Macnab.*

R. ST. J. C.

BARRETT, APPELLANT; HENRY, RESPONDENT (1).

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Oct. 27.

Evidence—Register of pharmaceutical chemists and of chemists and druggists—Admissibility of printed copy—Pharmacy Act (Ireland), 1875 (38 & 39 *Vict. c.* 57), *s.* 27.

The Pharmacy Act (Ireland), 1875, contains provisions for the making out, by the registrar appointed by the council of the Pharmaceutical Society for Ireland, of a register of pharmaceutical chemists for Ireland, and a register of chemists and druggists in Ireland, and sect. 27 provides that the registrar shall, every year, cause to be printed, published, and sold, correct copies of such registers, and that "printed copies of such registers for the time being in force, purporting to be so printed and published as aforesaid, or any extract therefrom, or from the original registers, certified under the hand of the said registrar, and countersigned by the president or two members of the said council, shall be evidence in all Courts and in all proceedings" of the matters specified in the section:—

Held, that the condition as to certifying by the registrar and countersigning by the president or two members of the council, refers only to the case where an extract is intended to be made evidence, and that a printed copy of the register, purporting to be printed and published in accordance with the section, is admissible in evidence, though not so certified and countersigned.

CASE STATED under 20 & 21 Vict. c. 43.

The respondent was charged before the Justices at a Petty Sessions held at Coolany, in the county of Sligo, on a summons in which the appellant, a sergeant of the Royal Irish Constabulary, was the complainant, with having kept open shop for retailing and dispensing poisons contrary to the Pharmacy Act (Ireland), 1875, he not being a person properly qualified in that behalf according to law. The Justices made an order dismissing the complaint without prejudice, but on the application of the complainant stated the present case.

The case, as stated, set out that at the hearing of the complaint, a printed copy of the Annual Register of pharmaceutical chemists

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

K. B. Div. 1904. BARRETT v. HENRY.

for Ireland for the time being in force in conformity with the provisions of 38 & 39 Vict. c. 57, s. 27, and purporting so to be printed and published, was tendered in evidence by the complainant. That it was contended on behalf of the defendant that the said printed copy could not be received as evidence against the defendant, inasmuch as it was not certified in conformity with the provisions of the said 27th section. That the Justices being of opinion that the contention of the defendant was accurate in point of law, and that the said printed copy as tendered was not evidence against the defendant, not being verified under the hand of the registrar of the Pharmaceutical Society of Ireland, and countersigned by the president or two members of the council of the said Society in conformity with the provisions of the said 27th section, dismissed the complaint without prejudice. The judgment of the Court was required as to whether the Justices were correct in point of law in their determination, or as to what should be done in the premises.

Day (with him *Gordon, K.C.*), for the appellant :—

Section 27 of the Pharmacy Act (Ireland), 1875, provides for three distinct methods of proof—1st, a printed copy of the register purporting to be printed and published by the registrar; 2ndly, an extract from such printed copy; and, 3rdly, an extract from the original register. We submit that the provisions as to certifying by the registrar and countersigning by the president or two members of the council, apply only to the second and third methods of proof. This is in accordance with the grammatical construction of the section, and also with its policy, the object being to facilitate the mode of proof. Under the Act the registrar is bound to make out and keep a correct register, and to print, publish, and sell correct copies of it. No hardship is suffered by a defendant in such case, since the printed copy is merely *prima facie* evidence. It is clear that under the corresponding section of the English Act, 31 & 32 Vict. c. 121, section 13, the printed copy is evidence without more, and it is to be presumed that the intention was that the law should be the same in both countries. The statement in Taylor on Evidence, 9th ed., p. 1078, that "the

registration of pharmaceutical chemists, and of chemists and druggists, is provable by printed copies of the registers purporting to be published by the registrar appointed under the Pharmacy Acts of 1852 or 1868, and countersigned by the president or two members of the council of the Pharmaceutical Society," if it means that such countersigning is necessary to the admissibility in evidence of the printed copy, cannot be supported.

J. B. Powell, for the respondent:—

I submit that the provisions of sect. 27 of 38 & 39 Vict. c. 57, as to the certifying by the registrar and countersigning by the president or two members of the council, apply to all the preceding matters mentioned in the section. This is the proper construction grammatically, and is also in accordance with the policy of the Act. Section 13 of the English Act, 31 & 32 Vict. c. 121, undoubtedly makes the printed copy evidence without further authentification, but that Act contains no provisions corresponding to those in sections 25 and 26 of our Act enabling the council, as distinct from the registrar, to restore or erase names in the register. In Ireland, therefore, the printed copy may not accurately represent the real register, inasmuch as there may have been a subsequent alteration by the council. For this reason the 27th section of our Act is designedly framed differently from sect. 13 of the English Act, and requires the printed copy to be further authenticated by the body having power to make alterations in the register.

Gordon, K.C., in reply.

LORD O'BRIEN, L.C.J.:—

This case is of some little importance. The net question is whether a printed copy of the register of pharmaceutical chemists, purporting to be printed and published by the registrar, but not certified under the hand of the registrar and countersigned by the president or two members of the council of the Pharmaceutical Society of Ireland, is evidence under the provisions of section 27 of the Pharmacy Act (Ireland), 1875,

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for the purpose of showing that the defendant is not a registered pharmaceutical chemist, inasmuch as his name does not appear in such printed copy. We are all of opinion that it is evidence for this purpose, though not so certified and countersigned. Mr. Henn, the Resident Magistrate, took a different view, but he had not the advantage of hearing the arguments which have been addressed to us, nor was he referred to the English statute, which certainly throws some light on the matter. It is quite plain on referring to the 13th section of the English Act, 31 & 32 Vict. c. 121, that in England the methods of proof are alternative, and that the production of the printed copy is sufficient, though not certified or countersigned. Bearing this in mind, I now come to the 27th section of our Act. The section commences by enacting that the registrar shall, in the month of January in every year, cause to be printed, published, and sold, correct copies of the register of pharmaceutical chemists and of the register of chemists and druggists, in alphabetical order according to the surnames, thus making it the duty of the registrar to have correct copies of these registers printed and published.

The section then goes on :—

> "And printed copies of such registers for the time being in force, purporting to be so printed and published as aforesaid, or any extract therefrom, or from the original registers, certified under the hand of the said registrar, and countersigned by the president or two members of the said council, shall be evidence in all Courts and in all proceedings that the persons therein specified are registered according to the provisions of this Act, and the absence of the name of any person from any such copy of either of the said registers shall be evidence, until the contrary shall be made to appear, that such person is not registered in such register according to the provisions of this Act."

On the language of the section, I think that three distinct methods of proof are authorized—a printed copy purporting to be printed and published by the registrar, an extract from such printed copy, and an extract from the original register—and that the words "certified under the hand of the said registrar, and countersigned by the president or two members of the said council," apply only to the two modes of proof immediately antecedent, viz., an extract from the printed copy or from the original register. When the

first mode of proof mentioned in the section is relied on, why should anything more be required than the copy purporting to be printed and published in accordance with a statutory obligation? It would be a work of supererogation that such a copy should also have to be certified and countersigned. It is, however, only *prima facie* evidence; and in the case put by Mr. Powell of a subsequent amendment of the register, it would be open to the defendant to give evidence of this. We must send back the case to the magistrates, with an intimation that they were wrong in their determination.

GIBSON and MADDEN, JJ., concurred.

Solicitors for the appellant: *Casey & Clay.*
Solicitor for the respondent: *James Fitzgerald.*

J. G. T.

K. B. Div. 1904. Oct. 25.

THE KING (CAHILL) *v.* THE DIVISIONAL JUSTICES OF DUBLIN (1).

Motor car—Motor Car Act, 1903 (3 *Edw.* 7, *c.* 36), *sect.* 1—*Speed dangerous to public—No evidence of actual traffic—Justices—Conviction—Duplicity—Dublin Police Act*, 1842 (5 & 6 *Vict. c.* 24), *sects.* 70, 72—*Entry of order in police summons book—Power to correct technical error when drawing up conviction*—Certiorari.

The prosecutor was summoned, under sect. 1 of the Motor Car Act, 1903, before a Divisional Justice of the Metropolitan Police District, for having, at Stephen's Green, East, in the said district, driven a motor bicycle recklessly and at a speed dangerous to the public on the highway. Evidence was given by a police constable that the prosecutor had driven the bicycle along the east side of Stephen's Green a distance of 264 yards in twenty-four seconds in the middle of the day. No evidence was given as to the actual state of traffic there at the time. The prosecutor was convicted and fined £10. The conviction, as formally drawn up, stated, following the language of the section of the Act, that the prosecutor was convicted for that he "at Stephen's Green, East, in the county of the city of Dublin, . . . did drive a motor bicycle on the public highway at a speed dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually was at the time, or which might reasonably be expected to be, on the said highway":—

Held, upon an application by prosecutor, on notice, for a conditional order for a *certiorari*, that the conviction was good in form, and that it was not necessary that it should appear on its face whether the circumstances taken into consideration by the magistrate were the amount of the traffic which was actually at the time on the highway, or the amount which might reasonably be expected to be there.

Held, also (assuming it to be open to the prosecutor, having regard to the form of conditional order asked for, to go into the sufficiency of the evidence), that the evidence was sufficient to justify a conviction under the section.

Held, also, that the magistrate, in drawing up then and there the formal conviction, was at liberty to amend a technical error in the form of the order, as appearing in the entry in the police summons book.

(1) Before Lord O'Brien, L.C.J., and Gibson and Madden, JJ.

CERTIORARI.

An application having been made *ex parte* for a conditional order for a writ of *certiorari*, notice of the application was directed to be served, and accordingly the present motion was made on behalf of the prosecutor, on notice, for a conditional order for a writ of *certiorari* to bring up and quash an order and conviction of Mr. Drury, one of the Divisional Justices of the Dublin Metropolitan Police District, dated the 21st September, 1904, on the grounds "that the same were made without, and in excess of, jurisdiction, and bad *ex facie* as being uncertain, and did not dispose with certainty of each charge, and were undetermined, and on the ground that the applicant was convicted of a different offence from that stated in the summons, . . . and that the magistrate did not separately adjudicate upon each separate charge."

The prosecutor had been charged on summons under the Motor Car Act, 1903, with having on the 7th September, 1904, at Stephen's Green, East, within the Metropolitan Police District, driven a motor bicycle recklessly and at a speed dangerous to the public on the highway, contrary to the statute. The summons was heard on the 21st September. The only evidence given on the hearing was that of a police constable, who deposed as follows:—"On the 7th inst., at the corner of Stephen's Green and Leeson-street, I saw defendant drive a motor bicycle along the thoroughfare. He did the 264 yards in twenty-four seconds along Stephen's Green in the middle of the day." The defendant was convicted, and fined £10. The entry made in the police summons book, dated the 21st September, 1904, in the column headed "Substance of Complaint," set out "Did drive motor bicycle IK 33 recklessly, and at a speed dangerous to the public at," &c.; and in the column headed "Magistrate's Order," set out "£10."

The conviction, which was of the same date, stated that the defendant was convicted and fined £10 for that he "at Stephen's Green, East, in the county of the city of Dublin, in said district, did drive a motor bicycle on the public highway, at a speed dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually was at the time, or which

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might reasonably be expected to be, on the said highway, contrary to the statute in such case made and provided."

The affidavit of the prosecutor, on which the application was grounded, referred to copies of the summons and conviction, and stated that deponent was informed and believed that the said conviction was bad.

Horan, for the prosecutor :—

I submit, in the first place, that the order and conviction are bad in form. From the entry in the police summons book it appears that the prosecutor was convicted of driving recklessly and at a speed dangerous to the public. These are two distinct offences; and as it does not appear on which of them the prosecutor was convicted, the order is bad: *R.* v. *Wells* (1). Even if the conviction subsequently drawn up is to govern the case, it also is bad, as it does not appear whether the circumstance relied on as indicating a speed dangerous to the public was the amount of traffic which actually was at the time on the highway, or the amount which might reasonably be expected to be thereon.

Secondly, I submit that there was no evidence to justify a conviction under sect. 1 of the Motor Car Act, 1903. The evidence is directed solely to the rate of speed, and no evidence was given as to the amount of traffic. When the rate of speed is relied on as constituting the offence, the prosecution should be brought under sect. 9, and the requirements of that section complied with as to the number of witnesses to the rate of speed, and the giving of due warning or notice of the intended prosecution. When the prosecution is under the 1st section of the Act, one of the elements to be taken into consideration is the amount of traffic, and evidence should be given to show the existence of traffic: *Hill* v. *Somerset* (2); *Dunn* v. *Holt* (3). The cases of *Smith* v. *Boon* (4) and *Mayhew* v. *Sutton* (5) were decided on the Light Locomotives on Highways Order, 1896, and are not authorities upon the present statute, which was passed with the object of relaxing in favour of motorists the previously existing law.

(1) 68 J. P. 392.
(2) 51 J. P. 742.
(3) 90 L. T. 577.
(4) 84 L. T. 593.
(5) 86 L. T. 18.

Cecil Atkinson, for the Divisional Justices :—

The entry in the police summons book is merely a note or memorandum made in compliance with the provisions of sect. 70 of 5 & 6 Vict. c. 24, and is not in any way conclusive. Sect. 72 of the same Act provides for the drawing up of a formal conviction; this has been done in the present case, and such conviction is the document to be looked at. It is legitimate when drawing up the conviction to correct a technical error in the entry in the summons book: *R.* v. *Barker* (1); *R.* v. *Allen* (2). The conviction here is good in form. It alleges that the motor bicycle was driven at a speed dangerous to the public, having regard to all the circumstances of the case; the subsequent enumeration of these circumstances is mere surplusage.

The second point taken, viz.: that there was no evidence to justify a conviction, is not open to the prosecutor on this motion. It is clear from the notice of motion, and also from the affidavit of the prosecutor, that what is relied on is a defect in form merely. But assuming the point to be open, there was sufficient evidence to warrant the conviction. It is not necessary to prove the actual amount of traffic at the time; the section expressly provides as an alternative circumstance to be taken into account the traffic "which might reasonably be expected to be on the said highway." There was evidence that the occurrence took place at Stephen's Green, East, in the city of Dublin, in the middle of the day, and the magistrate is entitled to notice judicially the traffic which might be reasonably expected to be in such place and at such time.

LORD O'BRIEN, L.C.J. :—

The first point made by Mr. Horan is that the order as appearing in the police summons book was bad for duplicity. But when we look at the actual formal conviction, we find it to be a single conviction upon a single charge, and perfectly good in form. In case of a technical defect in the memorandum of the order made in the police summons book, it is quite open to the magistrate, in drawing up then and there the formal conviction,

(1) 1 East, 186. (2) 15 East, 333.]

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under the Dublin Police Act, 5 & 6 Vict. c. 24, to amend such technical defect.

Mr. Horan's second point is that there was no jurisdiction, because there was no evidence to warrant a conviction. That is, of course, that there was no evidence at all, because we cannot go into the balance of the evidence. I do not think that this point is open on the present application. If it had been intended to be relied on, it should have been taken in the clearest and most explicit manner, and I do not think it has been so taken. But, even assuming that the point was open, I am of opinion that there was ample evidence before the magistrate to warrant a conviction. I shall read the words of the section under which the conviction was made:—"If any person drives a motor car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under this Act."

The gist of the offence is the danger to the public. Let me read the evidence in the present case. The police constable states: "On the 7th instant, at the corner of Stephen's Green and Leeson-street, I saw defendant drive a motor bicycle along the thoroughfare. He did the 264 yards in twenty-four seconds along Stephen's Green in the middle of the day." I think that that was sufficient to warrant Mr. Drury in convicting. He must be taken to know something of the nature of the locality—Stephen's Green, in the city of Dublin. I think, too, that the words "in the middle of the day" are significant as indicating the condition of the traffic at the time.

GIBSON, J., concurred.

MADDEN, J.:—

As a question of general importance has been argued in this case, I add a few words expressing my reading of the statute, while I entirely agree with the view of the case taken by my Lord Chief Justice.

In this Act, which has been drawn with great care, the Legislature had before it two objects. First, a relaxation of the existing state of the law in favour of a new and important addition to our modes of locomotion, which has also added to the enjoyment of large numbers of people. But as this mode of locomotion is attended with obvious danger, the Legislature took care at the same time to secure additional protection to the public lawfully using the highway. The relaxation in favour of motorists is contained in the 9th section. This section imposes an extreme limit to the rate of speed; but as it is difficult to form an accurate opinion as to the speed of either horse or motor, provisions are inserted requiring a warning to be given, and the testimony of at least two witnesses. The first section is drawn in a different manner. The offence there depends not on the single element of rate of speed, but on a combination of circumstances creating danger to the public. The offence is committed when any person "drives a motor car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case." These are the words defining the offence, and the subsequent words in the section are merely an enumeration of certain circumstances which ought to be before the magistrate when considering whether the driving was dangerous to the public. In my opinion, the conviction would have been good if it had stopped at the words "having regard to all the circumstances of the case," and it is none the worse because the magistrate adds the subsequent words appearing in the section.

I agree with my lord that the words used by the witness "in the middle of the day" may be regarded as some evidence of the existence of traffic; but, in my opinion, it was unnecessary to go into evidence of the actual existence of traffic at the time. The words of the section—"or which might reasonably be expected to be"—make this plain. In my opinion, the magistrate was not only at liberty, but bound, to take notice that this place was a highway in the metropolis of Dublin, a city with a population of some 300,000 inhabitants. The amount of traffic that might reasonably be expected in such a place is one of the circumstances of the case to which he was bound to have regard.

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Madden, J.

The argument founded on the 9th section does not apply. A conviction under the 1st section is not necessarily founded on the attainment of any definite rate of speed, or on the actual presence of traffic, although these are elements to be taken into consideration in considering whether the motor is driven "in a manner which is dangerous to the public."

Solicitors for the prosecutor: *Carlyle & Duncan.*
Solicitor for the Divisional Justices: *Sir Patrick Coll.*

J. G. T.

ALLEN, APPELLANT; SMALL, RESPONDENT (1).

K. B. Div. 1904. Oct. 27, 28.

Cruelty to animals—Cock—Cock-fighting—12 & 13 *Vict. c.* 92, *sects.* 2, 29—17 & 18 *Vict. c.* 60, *sect.* 3.

A cock is an animal within section 2 of 12 & 13 Vict. c. 92, and to cause cocks to fight is an offence within that section.

Budge v. *Parsons* (3 B. & S. 382) and *Bates* v. *M'Cormick* (8 Ir. Jur., N. S., 239) followed.

CASE STATED under 20 & 21 Vict. c. 43.

The respondent was charged before the justices at Petty Sessions on a summons brought under 12 & 13 Vict. c. 92, with having cruelly ill-treated and tortured cocks by causing them to fight. At the hearing evidence was given that the respondent had caused cocks to fight, but it was contended on his behalf that a cock was not an animal within the meaning of 12 & 13 Vict. c. 92, and that the occurrence was not punishable as an offence under sect. 2 of that statute. The majority of the magistrates were of opinion that this contention was correct, and they dismissed the case on the merits. The judgment of the Court was now required as to whether the majority of the justices were correct in point of law in their determination.

Cecil Atkinson, for the appellant:—

A cock is an animal within section 2 of the 12 & 13 Vict. c. 92: *Bates* v. *M'Cormick* (2); *Budge* v. *Parsons* (3); *Reg.* v. *Brown* (4); Webster's Dictionary, definitions of animal, domestic, cock, bird; New English Dictionary, definition of animal. [GIBSON, J., referred to *Johnstone* v. *Abercrombie* (5).] The matter is put beyond all doubt by the explanatory statute 17 & 18 Vict. c. 60.

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.
(2) 8 Ir. Jur. (N. S.) 239.
(3) 3 B. & S. 382.
(4) 24 Q. B. D. 357. [p. 37.
(5) Sess. Cases, 4th series, vol. 20,

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There was no appearance for the respondent.

LORD O'BRIEN, L.C.J.:—

The question in this case is a not uninteresting one, viz., whether a cock is an "animal" within section 2 of 12 & 13 Vict. c. 92. The section is as follows:—"And be it enacted that if any person shall from and after the passing of this Act cruelly beat, ill-treat, over-drive, abuse or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding five pounds." The word "animal" is defined by the 29th section as meaning:—"Any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal." Is a cock an animal within that definition? It is undoubtedly an animal, as distinguished from a vegetable or mineral; but is it an animal within this definition clause? I own that for myself I should have great difficulty in holding, apart from the explanatory statute to which I shall afterwards refer, that a cock was an animal within the meaning of that definition section, or that cock-fighting was intended to be prohibited by sect. 2. All the animals specifically enumerated in the 29th section are quadrupeds, and I should have thought, applying the principle that general words following particular are to be construed *ejusdem generis*, that the words "or any other domestic animal" would not include a cock. This was the view adopted by the Court of Session in Scotland in the case of *Johnstone* v. *Abercrombie* (1). But we have in this country the case of *Bates* v. *M'Cormick* (2), in which it was held that a cock was an animal within sect. 2 of the Act. That is a case of very high authority. It was decided in the year 1863 by Chief Justice Monahan and Mr. Justice, afterwards Lord Justice, Christian, following the English case of *Budge* v. *Parsons* (3), and it has been acted on ever since. Even apart, therefore, from the statute 17 & 18 Vict. c. 60, to which Mr. Atkinson has referred us, I should have followed the decision in *Bates* v. *M'Cormick* (2), and

(1) Sess. Cas., 4th series, vol. 20, p. 37. (2) 8 Ir. Jur. (N. S.) 239.
(3) 3 B. & S. 382.

held that a cock was an animal within the 2nd section of the 12 & 13 Vict. c. 92. All doubt, however, is removed by the 3rd section of the 17 & 18 Vict. c. 60, which enacts that the word "animal" in the Act of 12 & 13 Vict. c. 92 shall mean any domestic animal, whether of the kind or species particularly enumerated in sect. 29 or any other kind or species whatever, and whether a quadruped or not.

GIBSON, J., concurred.

MADDEN, J.:—

I only wish to add that while I should have followed *Bates* v. *M'Cormick* (1), even if I did not agree with it, I am entirely in accord with the decision in that case. The principle of construction known as *ejusdem generis* has not been regarded in recent decisions with the same respect as formerly. It is realised that it is open to the danger of defeating the intention with which words of general application are added to an imperfect enumeration. The adoption of this principle of construction in the present case would be to neutralize the words "or any other domestic animal." Having regard to the mischief in the contemplation of the Legislature, I think that the distinction intended to be drawn is not between quadrupeds and bipeds (which would seem to be irrevelant on the question of cruelty), but between domestic animals and animals *ferœ naturæ*, which were outside the contemplation of the Legislature.

Solicitor for the appellant: *Sir Patrick Coll.*

J. G. T.

(1) 8 Ir. Jur. (N. S.) 239.

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ACTION TO RECOVER POSSESSION OF LAND—*Non-payment of rent—Holding sublet—Judgment—Liability of middleman for arrears of rent—Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *sect.* 12.] A judgment in ejectment for non-payment of rent recovered by a superior landlord, where the entire holding is in the hands of sub-tenants, and the middleman does not redeem, discharges the middleman, in the case of holdings to which section 12 of the Land Law (Ireland) Act, 1896, applies, from personal liability for the arrears of rent due by him to the superior landlord. *Quære*—What is the effect of the section where only part of the holding is sublet, or where there are a series of sublettings one under another? *French* v. *Mitchell* - - - - K. B. 182

2. —— *On expiration of lease—Statutory term—Present tenancy—Lease created between passing of the Land Act*, 1881, *and the 1st January*, 1883—*Contracting out*—44 & 45 *Vict. c.* 49, *ss.* 4, 5, 8, 20, 22, *and* 57.] The defendant was tenant from year to year to the plaintiff of certain lands at the date of the passing of the Act of 1881. Prior to 1st January, 1883, the defendant took a lease from the plaintiff of these lands for a term of twenty-one years, from 21st November, 1881. The lease contained a covenant by the lessee, contracting himself out of the provisions of the Act of 1881. In 1896 the defendant took proceedings to have a fair rent of his holding fixed; the landlord contended the lands were demesne lands, and opposed the application; the Sub-Commission fixed a fair rent; the landlord appealed, on the ground that the lands were demesne. It transpired that the aggregate of the tenant's holdings were valued at above £150, but the Land Commission refused to allow the landlord to amend the notice of appeal so as to raise the question on the contracting out clause, and fixed a fair rent. On the expiration of the lease the landlord instituted an action to recover possession of the lands:—*Held*, by the Court of Appeal (affirming the decision of the King's Bench Division, Lord O'Brien, L.C.J., and Madden, J.; *diss.* Gibson, J.), that the order fixing a fair rent of the holding did not prevent the landlord recovering possession of the premises on the expiration of the lease. *Cope* v. *Gabbett* K. B. 234; App. 256

3. —— *On title—Second mortgagee against mortgagor—Legal estate outstanding.*] The defendants bought their farm from their landlord, through the Land Commission, under the Land Purchase Acts, in 1886, and by deed dated the 12th August, 1886, the lands were conveyed to them in fee. By the same deed the defendants mortgaged the land to the Irish Land Commission as security for the repayment of the purchase annuity. By a mortgage, dated the 4th May, 1901, the defendants mortgaged the land to the Antrim Building Company to secure the repayment of £1000. The mortgage contained a power of sale, and an express statement of the mortgage to the Land Commission. The Antrim Building Company sold the land under the power of sale to Houston. In an action of ejectment on the title by the Company and Houston as co-plaintiffs:—*Held*, by the King's Bench Division, that the judgment should be entered for the defendants. *Per* Lord O'Brien: That having regard to the decision of *Hodgens* v. *O'Donoghue* (28 I. L. T. R. 98), which a Court of first instance could not overrule, the judgment should be so entered. *Held*, by the Court of Appeal (reversing the King's Bench Division, and restoring the judgment of Kenny, J., at the trial), that the defendants could not set up, as a defence, that the legal estate was outstanding in the Land Commission, and that the plaintiffs were entitled to possession without bringing the Land Commission before the Court. *Antrim County Land Building and Investment Co., Limited, and Houston* v. *Stewart* [K. B. 357; App. 360

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BEER RETAILER—License—Notice of application to renew - - - - - 190
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BIAS — *Magistrate—Membership of temperance association—Engaging a solicitor to oppose license—Court—Licensing meeting—Licensing Acts—Grounds of objection—General discretion.*] Where Justices, at Licensing Sessions, refuse an application for a new license, made under section 6 of the Licensing (Ireland) Act, 1902, viz. in respect of premises attached to or adjoining premises licensed for the sale of intoxicating liquors at the date of the passing of the Act, they are exercising a general discretion upon the application, and they are not bound to set out upon the face of their order a "reason or ground for such prohibition," within the meaning of section 4 of the Licensing (Ireland) Act, 1833. An application by *F.* for a publican's license was refused by the Quarter Sessions for the county of Dublin. Three of the Justices composing the Quarter Sessions were subscribers to the funds of the Irish Association for the Prevention of Intemperance, whose objects were to secure a diminution in the number of licensed houses, and to organise

BIAS—*continued.*

strong opposition to licensing applications, and whose solicitor actually attended the Sessions and opposed, in the names of local objectors, the granting of licensing applications, the application of *F.* amongst the number. A fourth Justice was member of a firm which had subscribed to the funds of the Association, and two others, *A* and *B*, were members of the executive committee of the Association, which, before each Licensing Sessions, decided upon the licensing applications to be opposed, and, in the case of *F.*'s application, directed that the solicitor of the Association should oppose. *A* was not proved to have been a party to this decision. *B* was present, but exerted his influence in favour of allowing *F.*'s application to pass without opposition; his determination to vote for a refusal of the application was arrived at during the hearing of the Sessions. It was the practice of the executive committee, before each Licensing Sessions, to send circulars to over one hundred magistrates, apprising them of the dates, with a view to insuring their attendance:—*Held*, that no disqualification attached to any of the Justices from taking part in the determination of *F.*'s application. *Held*, also (Barton, J., *diss.*), that a Justice, in opposing, or retaining a solicitor to oppose, a licensing application, is not thereby disqualified from hearing and determining the application as a member of the licensing authority. *Per* Barton, J.: Mere membership of the executive committee is not *per se* sufficient to constitute "real and substantial bias"; but if it could be shown that a Justice hearing a licensing application had personally taken part in employing a solicitor to oppose it, "real and substantial bias" would be proved, and the Justice would be disqualified. *Held*, also, that, although the licensing authority in Ireland is a "Court," the English decisions dealing with bias on the part of Justices at "licensing meetings" are applicable to Justices composing the licensing authority in Ireland. *The King* (*Findlater*) v. *Recorder and Justices of Co. Dublin*
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See SOLICITOR'S LIEN.

BY-LAW—*Of District Council—Reasonableness—Whirligigs and swings—Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 38.] An urban district council, purporting to act under the powers conferred by sect. 38 of the Public Health Acts Amendment Act, 1890, made a by-law, subsequently confirmed by the Local Government Board for Ireland, that no person should cause or suffer any whirligig or swing to be set in motion,

BY-LAW—*continued.*
or driven on any land immediately adjoining or abutting upon any street or road within the district, unless such whirligig, or swing, was placed at a distance of not less than 20 yards from any road, or street, and separated from any street or road by a wall not less than 14 inches in thickness, and carried up to a height of not less than 4 feet from the level of the street or road:—*Held*, that the by-law was unreasonable and void, inasmuch as it required a structure of a permanent character, involving large expense, to provide against a temporary danger, which could as effectively be provided against by a temporary structure. *Enniscorthy Urban District Council, Appellants*; *Field, Respondent* - - - - - - K. B. 518

CARETAKER—Demand of possession—Bailiff—Authority - - - - - 591
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—— *Hodgens* v. *O'Donoghue* (28 Ir. L. T. R. 98) followed in King's Bench Division 357
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—— *Irish Land Commission* v. *Magorian* ([1901] 2 I. R. 445) approved - - 200
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—— *R.* (*O'Leary*) v. *Cork* (*Justices of*) (12 L.R.Ir. 167) approved of - - - 51
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—— *Waterford Union* (*Guardians of*) v. *Barton* ([1896] 2 I. R. 538) distinguished 429
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—— Petty Sessions order—Error in - - 64
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—— Renewal of spirit grocer's or beer retailer's license—Service of notice - - 190
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CERTIFICATE OF CONFORMITY—*Failure to pay* 10*s. in the* £—*Circumstances for which the bankrupt could not be justly held responsible—Section* 56 *of the Bankruptcy* (*Ireland*) *Amendment Act*, 1872 (35 & 36 *Vict. c.* 58)—*Damages and costs in an action for libel.*] The bankrupt was sued by *F.* for libel, and the action resulted in a verdict for the plaintiff for £3500 damages. The plaintiff's costs were taxed at £303 13*s.* 11*d.* On the petition of *F.*, *M.* was adjudicated bankrupt. The total debts proved (including the debt of £3803 13*s.* 11*d.*) amounted to £4167 19*s.* 6*d.*; and the total assets realised amounted (after payment of costs) to £1470 9*s.* 8*d.* This included two endowment policies of insurance effected by the bankrupt for the benefit of two members of his family, which had been given up, and had realised £766. The estate had paid a dividend of 7*s.* 6*d.* in the £:—*Held* (affirming the decision of Boyd, J.), that the failure to pay a dividend of 10*s.* in the £ did not arise from circumstances for which the bankrupt should not be justly held responsible, and that the bankrupt was not entitled to his certificate. *In re M'Hugh* - - - - - - APP. 118

2. —— *Failure to pay* 10*s. in the* £—*Circumstances for which the bankrupt could not be justly held responsible—Section* 56 *of the Bankruptcy* (*Ir.*) *Amendment Act*, 1872 (35 & 36 *Vict. c.* 58)—*Unsuccessful litigant.*] The bankrupt (W.) brought an action against the Rover Cycle Co., to recover damages for negligence, in consequence of a bicycle purchased by him from them having broken down, whereby he was injured. He obtained a verdict for £120, which was set aside by the King's Bench, and judgment was entered for the defendants. He appealed to the Court of Appeal, but his appeal was dismissed with costs. He paid to his solicitors £150 on foot of their costs, leaving £251 due to them, for which they issued a writ, and recovered

CERTIFICATE OF CONFORMITY— *continued.*
judgment. The Rover Cycle Co. taxed their costs in the action at £440. *W.* presented a petition for arrangement in the Belfast Bankruptcy Court, offering to pay his creditors 1*s.* in the £, but the petition was dismissed, and he was adjudicated bankrupt. He had no assets, and was a clerk in Belfast, earning 30*s.* a week. On the application of the bankrupt for a certificate of conformity:—*Held* (affirming the decision of the Recorder of Belfast), that the failure to pay a dividend of 10*s.* in the £ did not arise from circumstances for which the bankrupt should not be justly held responsible. *In re Williamson* - - - - App. 125

CERTIORARI—Prevalence of irregular practice —Discretion of Court - - 190
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—— Rate—Unsuccessful appeal to Quarter Sessions - - - - - - 374
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CHARGING ORDER—Costs—39 & 40 Vict. c. 44, s. 3 - - - - - 44
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CHILD—Sale of intoxicating liquor to—Act of assistant contrary to orders of publican
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—— Sale of intoxicating liquor to—Conviction—Whether to be endorsed on license 587
See Indorsement of Conviction.

CIVIL BILL DECREE — *Practice, County Court — Action for amount of former decree — Adjournment of hearing—Lapse of seven years from decree — Extinguishment of debt* — 14 & 15 *Vict. c.* 57, *s.* 144.] The plaintiff obtained a civil bill decree against the defendant on 13th April, 1896, no renewal of which was at any time applied for or granted. On 2nd January, 1903, the plaintiff issued a new civil bill to recover the amount due under the former one, which came on for hearing at Sessions held on 31st March, 1903, but stood adjourned to the ensuing Sessions, when the plaintiff obtained a decree for the amount sued for, dated 18th June, 1903. On a case stated by the Judge of Assize on appeal:—*Held* (Wright, J., dissenting), that the decree appealed from not having been made before the expiration of seven years from the date of the original decree, the debt and costs under the latter were, by virtue of section 144 of 14 & 15 Vict. c. 57, absolutely extinguished, and that the action was not maintainable. *O'Prey* v. *M'Kibben* (34 I. L. T. R. 162) considered. *Smith* v. *Smith* - - K. B. 522

CLERK OF PETTY SESSIONS — Salary — Receiver - - - - - 64
See Receiver.

COCK — *Cruelty to animals — Cock-fighting* — 12 & 13 *Vict. c.* 92, *sects.* 2, 29—17 & 18 *Vict. c.* 60, *sect.* 3.] A cock is an animal within section 2 of

COCK—*continued.*
12 & 13 Vict. c. 92, and to cause cocks to fight is an offence within that section. *Budge* v. *Parsons* (3 B. & S. 382) and *Bates* v. *M'Cormick* (8 Ir. Jur., N. S. 239) followed. *Allen, Appellant*; *Small, Respondent* - - - - K. B. 705

COLLECTOR OF INLAND REVENUE—Refusal to grant excise license—Certificate made without jurisdiction—Mandamus - - - - - - 494
See Licensing Acts. 1.

COLLISION—*Claim for damages for personal injuries—Pilot—Regulations for preventing collisions at sea — Articles* 10–21 — *Both ships in fault—Division of loss—Merchant Shipping Act*, 1894, *sect.* 419, *sub-sect.* 4—*Judicature Act* (*Ireland*), 1877, *sect.* 28, *sub-sect.* 9.] The plaintiff sustained personal injuries in a collision at sea that occurred between a schooner in his charge as pilot, and the defendants' steamer. In an action *in personam* against the defendants, claiming damages in respect of such injuries, caused, as alleged, by the negligence of the defendants, the jury (*inter alia*) found that the defendants were negligent in not getting out of the way of the schooner, or stopping; and assessed the plaintiff's damages at £500. It was admitted that the schooner, which was being overtaken by the steamer, displayed no stern light, as required by article 10 of the statutory regulations. On a motion to set aside the verdict and judgment entered for the plaintiff for £500 at the trial:—*Held*, that the Merchant Shipping Act, 1894, c. 60, sect. 419, sub-sect. 4, is not confined to Admiralty cases, but applies to all Courts; that the schooner was in fault in respect of the said breach of the collision regulations; and, *per* Andrews and Gibson, JJ. (Boyd, J., dissenting), that the Admiralty rule as to division of loss applied; and that the plaintiff was only entitled to half the damages assessed by the jury. *Boucher* v. *The Clyde Shipping Co.* - - - - K. B. 129

COMPANY—Articles of association—Restriction on transfer - - - - - 644
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—— Dentists — Refusal to register — Misleading name - - - - - - 634
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—— Taking or using name of dentists—Registration - - - - - - 27
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COMPENSATION—Compulsory purchase 15
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COMPROMISE — Receiver — Loan fund society
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COMPULSORY PURCHASE—*Local government — Acquisition of lands — Arbitration — Power of arbitrator to determine amount of compensation—Lands Clauses Acts — Housing of the Working Classes Act*, 1890, *sch.* 2, *clause* 7.] By a Provi-

COMPULSORY PURCHASE—*continued.*
sional Order of the Local Government Board, incorporating the 2nd schedule to the Housing of the Working Classes Act, 1890, a local authority was empowered to take lands compulsorily. An arbitrator was appointed. Evidence was given before him on behalf of the occupier of certain lands proposed to be taken that his interest therein was of a certain value. Evidence was given on behalf of the local authority valuing his interest at a less sum. The arbitrator inspected the lands, and awarded as compensation a sum less than the value as appearing from the evidence given on behalf of the local authority:—*Held*, that he was at liberty to do so, and was not confined within the limit of the amounts at which the interest was valued on behalf of the occupier and the local authority respectively. *Ex parte Crawford* v. *M'Swiney* [K. B. 15

—— Superfluous land—Title—Conditional limitation - - - - - 421
See Discovery.

CONDITIONAL LIMITATION—Superfluous lands—Lands Clauses Act, 1845, sect 127—Ejectment—Discovery - 421
See Discovery.

CONFORMITY—Certificate of - 118, 125
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CONSIDERATION—Partly in money—Estate duty—Deduction - - - 621
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CONTRACT—Excluding provisions of Land Acts—Lease between passing of Land Act, 1881, and 1st January, 1883 234, 256
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—— With county council—Member of council—Public work—Penalty - - 529
See County Council.

CONTRIBUTORY PLACE—*Local government — Water supply — Liability of contributory place for expense of water supply to part of such place—Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *s.* 233—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37)—*Public Health (Ireland) Act*, 1900 (63 & 64 *Vict. c.* 10)—*Powers of Local Government Board.*] The Local Government Board have no absolute discretion to determine the area of charge on which special expenses under the Public Health Act shall be levied. Apart from the provisions of the Public Health (Ireland) Act, 1900, which enables the Local Government Board, with the consent of the Rural District Council, to impose such expense on the whole rural district, their power is to determine which of the four units mentioned in section 232 of the Public Health (Ireland) Act, 1878, is to be selected as the area of charge. They have no power to aggregate two or more of these units, unless each such unit is a place in respect of which the expenses have been incurred. Decision of the King's Bench Division reversed. *The King (Ballycastle Rural District Council)* v. *The Local Government Board for Ireland* - K. B. 270; App. 283

CONTRIBUTORY PLACE—*continued.*

CONVICTION—Erroneous certificate of Petty Sessions order—Appeal—Affirmance 64
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—— Indorsement on license—Sale of intoxicating liquor to child - - - - 587
See Indorsement of Conviction.

COSTS—*Out of estate—Practice — Taxation — Disallowances where bill reduced by one-sixth—Professional charges, meaning of—R. S. C.*, 1893, *Ord. LXV., R.* 44 (*e*), *R.* 64 (40).] The words "professional charges" in Ord. LXV., R. 64 (40), mean professional charges properly so-called, and do not include disbursements of any kind. The English practice to the contrary not followed. *In the Goods of Kennedy; Cunningham* v. *M'Donagh* [K. B. (Prob.) 417

2. —— *Party and party—Practice—Taxation—Fees to counsel—Instructions for brief—Service of subpœnas—Attendance of solicitor on the record as witness—Rules of Supreme Court, Ireland*, 1893, *LXV., R.* 64.] In an action brought under Lord Campbell's Act, claiming damages in respect of the death of the plaintiff's husband, caused, as was alleged, by the negligence of the defendants, judgment was entered for the plaintiff for £2500 and costs. The plaintiff's solicitor paid to senior counsel fees on briefs on the trial of 20 guineas each, and to junior counsel a fee of 15 guineas, and refresher fees of 10 guineas and 7 guineas respectively. On the taxation of the plaintiff's costs as between party and party, the Taxing Master reduced the fees on counsels' briefs to 12 guineas and 8 guineas, and the refresher fees to 5 and 3 guineas respectively. He also reduced the charge of £100 claimed by the plaintiff's solicitor, for instructions for brief, to £20, and disallowed *in toto* a claim for allowances in respect of the said solicitor's attendance as a witness at the trial:—*Held*, on a motion for review of the taxation of the plaintiff's costs in the action, that the Taxing Master had failed to recognise the magnitude and difficulty of the case, and that the amounts paid to counsel on briefs on the trial should be restored; that the amount allowed to the plaintiff's solicitor for instructions for brief was inadequate, and that this item should be sent back to the Taxing Master for reconsideration. The Court refused to interfere with the exercise of the Taxing Master's discretion in respect of the refresher fees, and affirmed the disallowance of the claim in respect of the attendance of the plaintiff's solicitor as a witness. *Barry* v. *Spaight* - - - K. B. 478

COSTS—*continued.*

3. —— *Party and party—Practice—Taxation—Right of way—Public and private—General costs—*40 & 41 *Vict. c.* 57, *s.* 53.] In an action for damages for the obstruction of a right of way, claimed alternatively as a public and as a private right of way, the jury found in favour of the plaintiffs in respect of the claim founded on the public right of way, a verdict being directed for the defendant in respect of the claim founded on the alleged private right of way. On a motion for review of the taxation of costs:—*Held*, that the plaintiffs were entitled to the general costs of the action, and the defendant only to the costs of the issue on which he succeeded. *Kennedy* v. *Healy* ([1897] 2 I. R. 258) distinguished. *Smyth* v. *Wilson* - - - - - - - K. B. 40

—— Certiorari — Prevalence of erroneous practice - - - - - - 190
See LICENSING ACTS. 5.

—— Lien—Charging order - - - - 44
See SOLICITOR'S LIEN.

—— Unsuccessful litigation — Bankruptcy — Failure to pay 10*s.* in the £—Certificate of conformity - - - 118, 125
See CERTIFICATE OF CONFORMITY. 1, 2.

COUNSEL—Fees to— Instructions for brief—Taxation - - - - - - 478
See COSTS. 2.

COUNTY COUNCIL — *Local Government Act*, 1898 (61 & 62 *Vict. c.* 37)—*Orders, December*, 1898, *Art.* 12—*Contract in respect of public work in the district—Supply of goods to lunatic asylum—Asylum board representing two counties — Urban district councillor in one a contractor—Penalty.*] Article 12 of the Orders of the 22nd December, 1898, made under the Local Government (Ireland) Act, 1898, provides that "A person shall be disqualified for . . . being a member of a council . . . of a district . . . if he is concerned . . . in any bargain, or contract, entered into with the council" (*i.e.* county or district), ". . . and for the purpose of this provision any bargain or contract with the county council in respect of any *public work in a district* shall be deemed to be a bargain, or contract, with the council of that district." The respondent was an acting councillor for the urban district of Ballinasloe, County Galway, and while such acting councillor was a contractor to the board of governors of the Ballinasloe Lunatic Asylum for the supply of delft and brushes. The district of the asylum comprised two counties, Galway and Roscommon, and the board was a joint committee of the councils of both counties, with a representation from each council, pursuant to section 9 of the Act:—*Held*, that the respondent's contract was not one in respect of any public work within the district, and that therefore he had not incurred a penalty under article 12. *Held*, also, by Gibson, J., that

COUNTY COUNCIL—*continued.*

the contract was not within the mischief (viz. a conflict of interest and duty) prohibited. *Hastings* v. *Cogavin* - - - - - K. B. 529

—— Liability for repair of roads—Mandamus
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COUNTY COURT—Decree — Lapse of seven years—Extinguishment of liability 522
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COVENANT— Lease of licensed premises — Covenant to transfer license to landlord at expiration of term - - - 218
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CRIMINAL LAW— Conviction wrongly certified—Affirmance at Quarter Sessions
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—— Neglect to comply with statute—Repeated prosecutions - - - - - 1
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—— Sale of intoxicating liquor to child—Publican's assistant acting without knowledge of his master, and contrary to his orders
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—— Technical error in summons-book—Amendment - - - - - - 698
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CRUELTY TO ANIMALS—Cock-fighting
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DAMAGES — Personal Injuries — Merchant Shipping Act, 1894, s. 419, sub-s. 4 129
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DANGEROUS ARTICLE — Loaded gun — Negligence in leaving unguarded 317, 335
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DEATH—Property passing on - - 644
See ESTATE DUTY. 2.

DECREE—Civil bill - - - - - 522
See CIVIL BILL DECREE.

DEDUCTION—Estate duty - - - 621
See ESTATE DUTY. 1.

DEMAND OF POSSESSION — *Landlord and Tenant Law Amendment Act* (*Ireland*), 1860 (23 & 24 *Vict. c.* 154), *s.* 86 — *Caretaker — Bailiff orally authorised by landlord.*] By section 86 of the Landlord and Tenant Law Amendment Act (Ireland), 1860, in order to found a summons for the recovery of premises under the section, demand of possession must be made by the owner, or his known agent or receiver:—*Held*, that a demand of possession made by a bailiff orally authorised to make it by the owner, where such authority was known to the person from whom the possession was demanded, was a sufficient demand within the section. *Murphy, Appellant; Grady, Respondent* [K. B. 591

DENTIST—*Company—Name of proposed Company involving false representation — Refusal to register—Mandamus—Dentists Act*, 1878 (41 & 42 *Vict. c.* 33)—*Companies Act*, 1862 (25 & 26 *Vict.*

DENTIST—*continued.*

c. 89), *s.* 6.] The memorandum of association of a Company proposed to be formed for the purpose of carrying on the business of teeth extracting and artificial teeth making, provided that the name of the Company should be "S. G. Rowell, Dentist, Limited." None of the signatories to the memorandum (one of whom was S. G. Rowell) was registered as a dentist under the Dentists Act, 1878. The Registrar of Joint Stock Companies having refused to register the memorandum of association under the Companies Act, 1862:—*Held*, that a mandamus would not be granted to compel him to do so, since the use by the Company of the proposed name would involve a false representation, tending to mislead the public. *The King (Rowell)* v. *The Registrar of Joint Stock Companies for Ireland* - - - K. B. 634

2. —— *Registration—Taking or using the name—Person—Company — Dentists Act*, 1878 (41 & 42 *Vict. c.* 33) — *Interpretation Act* (52 & 53 *Vict. c.* 63).] The word "person" in the Dentists Act, 1878, relates only to an individual, and does not embrace a corporation or company. A company, by assuming a name which includes the words "surgeon dentists," does not become liable to a prosecution under the Act for using a name, title, addition, or description, implying that it is registered under the Act. *O'Duffy* v. *Jaffe* [K. B. 27

DISCOVERY — *Practice — Ejectment — Title—Superfluous lands — Conditional limitation—Forfeiture — Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 127.] Where, under the provisions of sect. 127 of the Lands Clauses Consolidation Act, 1845, superfluous lands become, in default of sale within the prescribed period, vested in the adjoining owners, the vesting takes place by force of a conditional limitation and not of a forfeiture. In an action brought to establish title to lands which the plaintiff claimed had become vested in him under the above section, the defendants objected to answer interrogatories, on the ground that discovery might disclose facts in consequence of which lands might become forfeited:—*Held*, that having regard to the distinction between a conditional limitation and a forfeiture, the defendants were not entitled to exemption from discovery. *Miller* v. *Waterford Harbour Commissioners* - - - - K. B. 421

DISCRETION—of Court—*Certiorari* - 190
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—— Of magistrates at Licensing Sessions 75
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DISTRESS—Goods of deceased person—Action pending for grant of administration—Injunction on application of plaintiff, alleged sole next-of-kin - - - 427
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DUBLIN—Rates—Arrears—Liability of occupier *See* RATES. 3. [596

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DWELLINGHOUSE — Separate bedroom — Parliamentary franchise - 383, 389
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EJECTMENT.
See ACTION TO RECOVER POSSESSION OF LAND.

EQUITABLE EXECUTION—Receiver 69
See RECEIVER.

EQUITABLE TITLE — Second mortgagee—Ejectment - - - 357, 360
See ACTION TO RECOVER POSSESSION OF LAND. 3.

ESTATE DUTY—*Deduction — Marriage settlement*—Bonâ fide *purchase—Partial consideration in money or money's worth — Succession Duty Act*, 1853, *s.* 17—*Finance Act*, 1894, *s.* 3 (1), (2).] By a settlement on the marriage of *L.* and *D.*, *L.*, the husband, in consideration, partly of the transfer to him by *D.*, the wife, of 600 Grand Canal shares and partly of the marriage, granted certain lands in trust for himself for life, and after his death for *D.* absolutely. Upon *L.*'s death the lands, portion of which had in the meantime been sold, were represented by £8119 4*s.* The Commissioners of Inland Revenue claimed estate duty upon the full sum of £8119 4*s.* as being the principal value of the property passing to *D.* upon the death of *L.*, ascertained in accordance with the provisions of the Finance Act, 1894. They disputed *D.*'s right to a deduction of £6600, being the value at the date of the settlement of the consideration in Grand Canal shares, upon the ground that the transaction embodied in the settlement was not one in which the £8119 4*s.*, the value of the land, was to pass to her upon the death of *L.*, by reason only of a *bonâ fide* purchase from him for partial consideration in money or money's worth, within the meaning of section 3 (2) of the Act:—*Held*, that the expression "partial consideration in money or money's worth," in section 3 (2), was intended to relate to contracts in which the consideration was partly money or money's worth and partly marriage, and that the sum in respect of which *D.* was liable to pay estate duty was to be ascertained by deducting £6600, the value of the consideration in money or money's worth, from £8119 4*s.*, the value of the property passing to her under the settlement upon the death of *L.* *In re Lombard* [K.B. 621

2. —— *Shares — Company—Articles of association — Restrictions on transfer — Right of pre-emption—Estate duty—Principle of valuation—Sale in open market—Property passing on death—Repugnancy—Rule against perpetuity—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 16—*Finance Act*,

ESTATE DUTY—*continued.*

1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 3, 5; 7, *sub-s.* 5; 13, 22 (*b*).] By will, dated the 26th July, 1901, a testator devised all the residue of his property to his executors upon trust, to pay the interest of one-sixth part thereof to each of five of the testator's sons and daughters, respectively, for life; and of the remaining one-sixth part, to such of the children of a deceased daughter as should then be living, in equal shares; and he directed that, subject to the said life estates, his trustees should hold the said respective sixth-parts or shares (save as to the share of one daughter, which, after her death, was to be held in trust for the remaining residuary legatees) upon trust, for such person or persons as the parties respectively entitled to a life interest in the said shares might by deed or will appoint. The testator died on the 15th September, 1901, and the said will was duly proved by the three executors therein named. The residuary estate of the testator included 750 fully paid-up shares in the firm of J. J. & Son, Ltd., a Company registered on the 9th October, 1891, under the Joint Stock Companies Acts, dividends upon which had been paid by the Company for some years previously to the testator's death at the rate of twenty per cent. per annum. The articles of association of the Company contained an elaborate series of provisions relating to the registration of holders and to the alienation of shares in the Company, whereby it was (*inter alia*) provided that any member proposing to transfer a share should serve a "transfer notice" upon the Company (who were not bound to recognise any equitable claim in a share) of his intention to transfer, which notice constituted the Company his agent for the sale of the share to any member at the "fair value thereof," the latter being defined as a sum of £100, or such other sum as should from time to time be fixed as the "fair value" by resolution of the Company in general meeting. No share could, save as therein provided, be transferred to a non-member so long as any member was willing to purchase the same at the "fair value," the directors being empowered to refuse to register any transfer to a non-member of whom they did not approve, such transfer being void. Upon the Company, within twenty-eight days after the service of "the transfer notice," finding a member willing to purchase, the retiring member was bound, upon payment of the "fair value," to transfer the share to the purchasing member, in default of which the Company might receive the purchase-money and enter the name of the purchasing member in the register as the holder of the share. In the event of the Company not finding a purchaser within the twenty-eight days specified, the retiring member might, within three months, sell and transfer the share to any person, subject to the approval of the directors, and at any price. It was provided that the executors or administrators of a deceased member should be the only persons recognised by the Company as having any title to the shares registered in the name of such member, and that any person becoming entitled to a share in consequence of the death of any member might, subject to the regulations contained in the articles, transfer such share to himself or any other person; the executors of a deceased member being further empowered, subject to the approval of the directors, to transfer the share of such member to his son or brother, or to any son or brother of any existing member. Upon the death of the testator the executors paid for estate duty in respect of the said 750 shares a sum calculated on the basis that the value thereof was, having regard to the right of pre-emption and restrictions on transfer and sale contained in the articles, limited to the "fair value" of each share fixed by the articles at £100, and refused to pay any further duty. On an information by the Attorney-General, seeking a declaration that on the death of the testator estate duty became payable, under the Finance Act, 1894, upon the principal value of the said shares, being the price which same would fetch if sold in the open market at the time of the testator's death, and that such value was not limited to the "fair value" of £100 a share, or for the determination of the manner in which such value was to be ascertained:—*Held*, (1) That the principal value of the shares to which the testator was entitled at the time of his death was to be estimated at the price which the same would, in the opinion of the Commissioners of Inland Revenue, fetch if sold in open market at the time of such death, and that such principal value was not necessarily limited to the par or "fair value" of £100 a share. (2) *Per* Boyd and Kenny, JJ. (Palles, C. B., *diss.*), that in estimating such principal value regard was to be had by the Commissioners to the special provisions in the articles of association with reference to alienation and transfer of the shares of the Company, and as to the "fair value" thereof. (3) *Per* Boyd and Kenny, JJ., that the articles of association were not invalid, either as infringing the rule against perpetuity, or as being repugnant to the right of alienation inherent in absolute ownership. *Held*, *per* Palles, C.B. (without expressing any opinion as to the validity of the articles), that inasmuch as the entire legal and equitable interest in the shares was vested in the testator at the time of his death, the whole of such interest formed portion of the deceased's property passing on his death within section 1 of the Finance Act, 1894, and was accordingly subject to the payment of estate duty, that portion of the value of the shares which represented the right of pre-emption being properly within

ESTATE DUTY—*continued.*
section 2, sub-section (*b*), of the Act, and therefore deemed to pass, and that, on the true construction of section 7, sub-section 5, of the Finance Act, the valuation of the shares ought to be based upon a supposititious, not an actual, sale in the open market, excluding the consideration of such provisions in the articles of association as would prevent a purchaser at the sale from becoming a member of the Company, and registered as such in respect of the shares purchased by him at such supposititious sale. *Borland's Trustee* v. *Steel, Bros., & Co., Ltd.* ([1901] 1 Ch. 279), followed. *The Attorney-General* v. *Jameson* K. B. 644 [VAR.]

ESTOPPEL—Rating appeal—1 & 2 Vict. c. 56, s. 107 - - - - - - 374
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EVIDENCE — Admissibility — Libel — Justification - - - - - 536, 547
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—— Admissibility — Register of pharmaceutical chemists—Printed copy - - 693
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—— Speed dangerous to the public—Motor Car Act, 1903 - - - - - - 698
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EXCISE LICENSE—Refusal to grant—Certificate made without jurisdiction - 494
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EXECUTION—Equitable - - - 69
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EXECUTOR — Of deceased lessee — Refusal to carry on publican's business—Surrender —Covenants as to license - - 218
See LEASE.

—— Revocation of probate—Laches - - 267
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EXEMPTION—Rates—Public purposes 429
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—— Veterinary surgeon—Juries - - 565
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FAIR RENT—Fixed under Redemption of Rent Act—Liability to tithe rentcharge 200
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FALSE REPRESENTATION — Name of Company — Refusal to register — Mandamus - - - - - - 634
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FEE-FARM GRANT—Fair rent fixed under Redemption of Rent Act — Liability of grantee to tithe rentcharge - 200
See TITHE RENTCHARGE.

—— Variable rent - - - - - - 502
See VARIABLE RENT.

FOOTPATH—Dedication to the public - 105
See STREET.

FORFEITURE—Publican's license—Third conviction—Not within same year - 51
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—— Superfluous land—Lands Clauses Act, 1845, sect. 127—Ejectment—Discovery 421
See DISCOVERY.

FRANCHISE—Parliamentary - 383, 389
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GUN—Negligence in leaving unguarded while loaded - - - - - 317, 335
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INCORPORATION OF STATUTE - 587
See INDORSEMENT OF CONVICTION.

INDORSEMENT OF CONVICTION—*License —Licensing Acts—Incorporation of statutes—Intoxicating Liquors (Sale to Children) Act*, 1901 (1 *Edw.* 7, *c.* 27)—*Licensing (Ireland) Act*, 1874 (37 & 38 *Vict. c.* 69), *s.* 21.] A publican having been convicted, under the Intoxicating Liquors (Sale to Children) Act, 1901, for selling intoxicating liquor to a child under fourteen, contrary to the provisions of the Act:—*Held*, that the conviction could not be ordered to be indorsed on his license. *The King (Haslett)* v. *Justices of Tyrone and Fermanagh* - - - - - - K. B. 587

INHABITANT OCCUPIER— Separate bedroom—Dwellinghouse - 383, 389
See PARLIAMENT. 1, 2.

INJUNCTION — *Probate — Practice — Intermeddling with assets before administration—Application of next-of-kin.*] Where, shortly after the death of a tenant intestate, the landlord wrongfully entered and seized the goods of the deceased, the Court, on the *ex parte* application of the sole next-of-kin before administration, granted an injunction to restrain the landlord from interfering with the assets, the plaintiff giving an undertaking as to damages. *In the Goods of Cassidy*; *Cassidy* v. *Foley* - - - - - K. B. (PROB.) 427

INSTRUCTIONS—For brief—Taxation between party and party - - - 478
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INTERROGATORIES.
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INTOXICATING LIQUOR—Sale to Children - - - - - 498, 587
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JUDGMENT—In ejectment—Holding sublet—Discharge of middleman from liability for arrears of rent - - - - - 182
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JURISDICTION—Auditor—53 & 54 Vict. c. 70, sched. 2, clause 7 - - - 15
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—— King's Bench Division—Amendment of order made at Quarter Sessions - - 64
See QUARTER SESSIONS.
—— Quarter Sessions — Certificate for excise license made without - - 494
See LICENSING ACTS. 1.

JURY—*Exemption—Veterinary surgeon*—14 & 15 *Vict. c.* 90, *s.* 9—39 & 40 *Vict. c.* 78, *s.* 20.] A duly qualified veterinary surgeon is entitled to exemption from serving on any jury, inquest, or inquiry, by virtue of coming within the description of persons exempted in sect. 20 of the Juries Procedure (Ireland) Act, 1876 (39 & 40 Vict. c. 78), and the schedule annexed thereto, as being a "licensed medical practitioner." *In re Allen* [CR. CAS. RES. 565

JUSTICES—Bias — Membership of temperance association — Licensing application — Engaging solicitor to oppose - 75
See BIAS.
—— Conviction—Duplicity — Technical error in summons-book—Power to amend 698
See MOTOR CAR.
—— Conviction — Summons alleging several offences—Appeal to Quarter Sessions—Affirmance of order as erroneously certified - - - - - - 64
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—— Indorsement of conviction—Sale of intoxicating liquor to child - - - 587
See INDORSEMENT OF CONVICTION.
—— Licensing Acts.
See LICENSING ACTS.
—— Loan fund society—Promissory note—Time within which proceedings must be taken
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—— Neglect to vaccinate—Second prosecution 1
See VACCINATION.
—— Recovery of possession from caretaker — Demand—Bailiff—Authority - 591
See DEMAND OF POSSESSION.

LACHES—Revocation of probate - - 267
See REVOCATION OF PROBATE.

LAND LAW (IRELAND) ACTS—Fair rent fixed under Redemption of Rent Act—Liability to tithe rentcharge - 200
See TITHE RENTCHARGE.
—— Judgment in ejectment for non-payment of rent—Subletting—Discharge of middleman from liability for arrears of rent—Land Law Act, 1896, s. 12 - - 182
See ACTION TO RECOVER POSSESSION OF LAND. 1.
—— Lease between passing of Act of 1881 and 1st January, 1883—Lessee contracting out [234, 256
See ACTION TO RECOVER POSSESSION OF LAND. 2.

LAND LAW (IRELAND) ACTS—*continued.*
—— Purchase of holding by tenant—Mortgage to Land Commission—Second mortgage — Ejectment - - - 357, 360
See ACTION TO RECOVER POSSESSION OF LAND. 3.
—— Surrender by middleman—Time for—Land Law Act, 1887, s. 8 - 145, 167
See SURRENDER.

LANDLORD AND TENANT — Distress — Goods of deceased person—Interest cause pending—Injunction - - 427
See INJUNCTION.
—— Fee-farm grant — Fair rent fixed under Redemption of Rent Act—Liability to tithe rentcharge - - - 200
See TITHE RENTCHARGE.
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See LEASE.
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—— Rates—Belfast Improvement Act, 1845—Letting in separate apartments - 374
See RATES. 1.
—— Summary procedure to recover possession—Bailiff—Authority - - - 591
See DEMAND OF POSSESSION.
—— Variable rent—3 Edw. 7, c. 37, s. 90 502
See VARIABLE RENT.

LEASE — *Of licensed premises — Covenants—To preserve the license—To assign and transfer the license at the end of the term to the landlord—Death of tenant—Executrix declining to carry on business, and closing the public-house — Loss of license.*] *J. W.* was tenant of a licensed house at S., in the county of Donegal, under an agreement, dated the 11th February, 1891, for ten years, at the rent of £20, and on the expiration of the term, in 1901, he remained on as an over-holding tenant. The agreement contained covenants by the tenant—(1) not to do or suffer any act whereby the license might be forfeited or affected prejudicially, or the renewal might be withheld; (2) that he would do all acts necessary to procure a renewal of the license, and not to assign or sublet the premises without consent in writing; and (3) at the expiration of the term to do all acts necessary for assigning and transferring the then existing license to the nominee of the landlord. *J. W.* died on the 26th October, 1902, and by his will he appointed the defendant, his widow, sole executrix. *J. W.* had a license for the year ending October, 1902, and he had obtained a certificate from the magistrates at the Licensing Sessions for a renewal of that license, but he had not paid the duty. A few days after his death *B.*, one of the ptaintiffs, had a conversation with the defendant, when the defendant stated that she would not carry on the business, and intended to surrender the premises.

LEASE—*continued.*

B. stated that it would be necessary to put the premises in repair, which the defendant agreed to do, and pay the duty. The defendant then gave *B.* the amount of the duty, and asked him to pay it for her, which he agreed to do. *B.* paid the duty and took out the license in the name of *J. W.*, which he handed to *M.*, a solicitor, who had *J. W.*'s will in his possession; but *M.* was not retained or instructed by the defendant. In consequence of *M.* refusing to give up the will of *J. W.*, probate of the will was not obtained until the 16th December, 1902; but on the 29th November, 1902, *M.*, without instructions from the defendant, obtained an *interim* transfer of the license at Petty Sessions to the defendant. The plaintiffs insisted on the defendant putting the premises in repair, and keeping them open to carry on the business. The defendant refused to open the premises. On the 31st January, 1903, she removed the stock-in-trade, and sent the keys to the plaintiffs, who took possession next day. The plaintiffs took no steps to obtain an *interim* transfer or a new license, although the defendant offered to do everything necessary to transfer the license. The license was lost. In an action for damages for breach of the covenant to maintain the license, and transfer it at the end of the term:—*Held* (affirming the decision of the King's Bench Division), that the defendant, as executrix or tenant, was not bound to take out a license pending a surrender of the licensed premises, and that her omission to take it out and to carry on the publican's business was not an act done by her, by which the existing license was forfeited. *Brown* v. *Watson* - - - - - - APP. 218

—— Made between passing of Land Act, 1881, and 1st January, 1883—Lessee contracting out - - - - - 234, 256

See ACTION TO RECOVER POSSESSION OF LAND. 2.

LEGAL ESTATE—Outstanding—Ejectment [357, 360

See ACTION TO RECOVER POSSESSION OF LAND. 3.

LIBEL—*Practice—Particulars—Pleading—Justification—Evidence—Order XIX., Rules 4 and 6.*] The defendants published a libel on the plaintiffs, and, on an action for damages being brought, pleaded fair comment and justification. The libel charged the plaintiffs with swindling, obtaining goods from traders on credit and not paying for them in the city of *L.* It was pleaded generally, without an innuendo. The plea of fair comment mentioned some matters in the nature of particulars, all confined to the city of *L.*; but no particulars were given by the defendants or required by the plaintiffs, in respect of the plea of justification. At the trial the plaintiffs, in cross-

LIBEL—*continued.*

examination, admitted that they left *L.* secretly; that they left blinds and curtains up in their house when quitting; that they owed rent and bills to traders in *L.*, and they also admitted having left bills and rent due by them in the city of *C.*, where they had resided before they came to *L.* Evidence from witnesses in *C.* was then produced to show that they had previously pursued a course of dealing in *C.* similar to what was alleged by the libel against them in *L.* Notwithstanding objection, the Judge at the trial admitted this evidence, the objection not being grounded on surprise, but on the inadmissibility of evidence which had not been mentioned in the libel or in the plea of fair comment. The jury found for the defendants, and on a new trial motion:—*Held* (by the Court of Appeal, reversing the decision of the King's Bench Division), that the evidence was admissible, notwithstanding that no particulars had been given, the plaintiffs having waived their right to obtain particulars. *Hewson* v. *Cleeve* [K. B. 536; APP. 547

LICENSE — Covenant as to, in lease — Death of lessee—Refusal of executrix to carry on business—Surrender—Loss of license *See* LEASE. [218

—— Indorsement of conviction—Sale of intoxicating liquor to child - - 587

See INDORSEMENT OF CONVICTION.

LICENSING ACTS—*Licensing (Ireland) Act*, 1902 (2 Edw. 7, *c.* 18), *s.* 6—*Adjoining premises—Certificate granted for new license in contravention of Act—Refusal of Excise authorities to issue license—Mandamus—Form of certificate under* 2 *Edw.* 7, *c.* 18.] A mandamus will not lie to compel the collector of Inland Revenue to issue an Excise license for the sale of spirits, in pursuance of a certificate granted by the magistrates at Quarter Sessions, where such certificate was granted without jurisdiction, even though the certificate is, on its face, a valid one. *The Queen* v. *O'Connell* (2 L. R. Ir. 625) distinguished. *Quære*—Whether, since the passing of the Licensing (Ireland) Act, 1902, a certificate of the magistrates granting a license should not show on its face that the case comes within some of the exceptions in that Act. *The King (M'Clinchy)* v. *Greer* - K. B. 494

2 —— *Assignment of licensed premises* — Ad interim *order made at Petty Sessions — Transfer refused at Quarter Sessions on ground of character of applicant and unsuitability of premises—Re-assignment to original licensee*—35 & 36 *Vict. c.* 94, *s.* 3—18 & 19 *Vict. c.* 114—3 & 4 *Wm.* 4, *c.* 68, *s.* 4—37 & 38 *Vict. c.* 69, *s.* 12, *sub-sec.* 1—*Sale of intoxicating liquor.*] *A.* held a publican's license for the period of twelve months from the 10th October, 1902, in respect of certain premises which he held under lease for a term of years, subject to

LICENSING ACTS—*continued.*

a mortgage. In February, 1903, *A* and the mortgagees executed a deed, assigning the premises, license, and goodwill to *B*, who executed a fresh mortgage to the same mortgagees. *A* also purported to assign the license to *B* by endorsement. *A* gave up possession to *B*, who obtained the usual *ad interim* order at Petty Sessions, to remain in force until the next (April) Quarter Sessions, and *B* proceeded to carry on the trade of a publican in the premises. In April, 1903, shortly before the Quarter Sessions, *B* was convicted of an offence against the licensing laws. At the April Quarter Sessions the police opposed the transfer of the license to *B*, and the Justices refused to grant it, on the grounds of the unsuitability of the premises, and the character of the applicant. *B* then conveyed all his interest in the premises, license, and goodwill to the mortgagees, who subsequently, on the 15th May, 1903, let the premises to *A* for six months. *A* went back into possession, and resumed his trade as a publican. He was summoned, under section 3 of the Licensing Act, 1872, for having, on the 26th May, 1903, sold intoxicating liquors without being duly licensed:—*Held*, that *A* was not liable to be convicted of the offence. *Dumigan, Appellant*; *Walsh, Respondent* - K. B. 298

3. ——*Forfeiture—Publican's license—Third conviction—Not within the same year—Licensing Acts*, 1872, *s.* 30, 1874, *s.* 21.] It is not necessary to cause a forfeiture of a license that three convictions should be made within the same licensing year. *Reg.* (*O'Leary*) v. *Justices of the County of Cork* (12 L. R. Ir. 167) approved of. *The King* (*Hore*) v. *Justices of Wexford* - - - K. B. 51

4. ——*Sale of intoxicating liquor to children—Sale by assistant without knowledge and contrary to orders of licensee—Intoxicating Liquor* (*Sale to Children*) *Act*, 1901 (1 *Edw.* 7, *c.* 27), *s.* 2.] *M.*, a publican, was charged under 1 Edw. 7, c. 27, with having allowed his barman knowingly to sell and deliver intoxicating liquor to a girl under fourteen for consumption off the premises, the same not being in a corked or sealed vessel. *M.* had given orders to his assistants not to supply liquor to children in contravention of the statute. The liquor in the present case was sold by *M.*'s barman, *M.* himself not being in the shop at the time, though his foreman was. The magistrate held as a fact, on the evidence, that the sale of intoxicating liquor to the child was knowingly effected by the barman, but without the knowledge, actual or constructive, or the wilful connivance, of *M.* or his foreman, and he dismissed the summons:—*Held*, that *M.* had not knowingly allowed the intoxicating liquor to be sold within the meaning of the Act, and that the summons was properly dismissed. *Conlon, Appellant*; *Muldowney, Respondent* [K. B. 498

LICENSING ACTS—*continued.*

5. —— *Spirit grocer or beer retailer—Certificate for renewal of license—Service of notice of intention to apply for*—Certiorari—*Discretion of Court to grant or refuse—Beerhouses* (*Ireland*) *Act*, 1864 (27 & 28 *Vict. c.* 35), *s.* 4—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 82—*Beer Retailers' and Spirit Grocers' Retail Licenses* (*Ireland*) *Act*, 1900 (63 & 64 *Vict. c.* 30), *s.* 1.] The provisions of sect. 4 of the Beerhouses (Ireland) Act, 1864, requiring a person applying for the certificate from the magistrates necessary for the renewal of a beer retailer's or spirit grocer's license, to give twenty-one days' notice in writing of the application to the police, are mandatory, both as to the giving of the notice and the length of notice, and if not complied with the magistrates have no jurisdiction to grant the certificate. These provisions are not impliedly repealed by sect. 1 of the Beer Retailers' and Spirit Grocers' Retail Licenses (Ireland) Act, 1900. On an application for a writ of *certiorari* to quash an order of the Divisional Justices of the Dublin Metropolitan Police District granting such certificate, on the ground that the notice of the application was some days short of twenty-one days, it appeared that the practice of the Divisional Justices for years past had been to treat a reasonable notice, though short of twenty-one days, as sufficient, and in some cases to dispense with the notice altogether:—*Held*, that this practice was no ground for refusing the *certiorari*, although a matter to be taken into consideration on the question of costs. *The King* (*Byrne*) v. *Divisional Justices of Dublin* - - - K. B. 190

—— Alleged bias of Justice—Membership of temperance association — Engagement of solicitor to oppose application - 75
See BIAS.

—— Sale of intoxicating liquor to child—Conviction—Indorsement on license - 587
See INDORSEMENT OF CONVICTION.

LIEN—Solicitor's—Charging order - 44
See SOLICITOR'S LIEN.

LIMITATIONS, STATUTE OF— Action by Loan Fund Society on promissory note
See LOAN FUND SOCIETY. 2. [18

—— Statute-barred debt—Receiver—Compromise
See LOAN FUND SOCIETY. 1. [601, 612

LOAN FUND SOCIETY—*Receiver— Renewal notes—Statute-barred debt—Consideration— Power of receiver to compromise—Charitable Loan Societies* (*Ireland*) *Act*, 1900 (63 & 64 *Vict. c.* 25, *s.* 4.] A receiver, appointed to wind up a Loan Society constituted under the Loan Societies Acts, compromised claims on promissory notes due to the Society by taking a note and an I O U from debtors to Society. The claims compromised were on foot of renewal notes which, though validated by sect. 1 of the Loan Fund Act, 1900, were irrecoverable at

LOAN FUND SOCIETY—*continued.*
the time of giving the compromise note and the I O U:—*Held* (reversing the decision of the King's Bench Division), that the compromises were valid, under section 4 of the Charitable Loan Societies Act, 1900, and that the receiver could recover on the note and I O U in the County Court. *O'Reilly* v. *Connor*; *Same* v. *Allen* K. B. 601; [APP. 612

2. ——*Statute of Limitations—Promissory note—Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *sect.* 10, *sub-sect.* 4—6 & 7 *Vict. c.* 91—63 & 64 *Vict. c.* 25.] Proceedings by the treasurer of a loan society to recover the amount of promissory notes made for the repayment of loans under the Loan Societies (Ireland) Act, 1843, are subject to the provisions of sect. 10, sub-sect. 4, of the Petty Sessions (Ireland) Act, 1851, and must be brought within six months from the time when the cause of action arose. Decision of King's Bench Division in *Atthill* v. *Woods* ([1903] 2 I. R. 305) affirmed. *The King* (*O'Reilly*) v. *Justices of Fermanagh* - - - - - - APP. 18

LOCAL GOVERNMENT — By-Law — Urban district council — Unreasonableness — Public Health Act, 1890 - - 518
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—— Compulsory purchase — Jurisdiction of auditor—Amount of compensation 15
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—— Contributory place—Water supply—Powers of Local Government Board 270, 283
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—— County Council—Member of urban district council in county contracting with—Whether for a public work - 529
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—— Dublin, city of—Arrears of rates—Liability of occupier - - - - 596
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—— Roads—Repair of — Mandamus to County Council - - - - 569, 579
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LUNATIC ASYLUM—Board representing two counties—Urban district councillor in one a contractor for supply of goods 529
See COUNTY COUNCIL.

MANDAMUS—Collector of Inland Revenue—Excise license - - - - 494
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—— Registrar of Joint Stock Companies—Dentists—Refusal to register - - - 634
See DENTIST. 1.

MARRIAGE SETTLEMENT— Consideration—Estate duty - - - - 621
See ESTATE DUTY. 1.

MASTER AND SERVANT—Publican—Sale of liquor to children — "Knowingly allow" - - - - - - 498
See LICENSING ACTS. 4.

—— Service franchise - - - 383, 389
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MIDDLEMAN — Judgment in ejectment — Arrears of rent—Land Law Act, 1896, s. 12 - - - - - - 182
See ACTION TO RECOVER POSSESSION OF LAND. 1.

—— Surrender—Time for—Land Law Act, 1887, s. 8 - - - - 145, 167
See SURRENDER.

MORTGAGE — Puisne mortgagee — Ejectment by - - - - - - 357, 360
See ACTION TO RECOVER POSSESSION OF LAND. 3.

MOTOR CAR—*Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *sect.* 1—*Speed dangerous to public — No evidence of actual traffic — Justices—Conviction—Duplicity—Dublin Police Act*, 1842 (5 & 6 *Vict. c.* 24), *sects.* 70, 72—*Entry of order in police summons-book—Power to correct technical error when drawing up conviction*—Certiorari.] The prosecutor was summoned, under sect. 1 of the Motor Car Act, 1903, before a Divisional Justice of the Metropolitan Police District, for having, at Stephen's Green, East, in the said district, driven a motor bicycle recklessly and at a speed dangerous to the public on the highway. Evidence was given by a police constable that the prosecutor had driven the bicycle along the east side of Stephen's Green a distance of 264 yards in twenty-four seconds in the middle of the day. No evidence was given as to the actual state of traffic there at the time. The prosecutor was convicted and fined £10. The conviction, as formally drawn up, stated, following the language of the section of the Act, that the prosecutor was convicted for that he "at Stephen's Green, East, in the county of the city of Dublin, . . . did drive a motor bicycle on the public highway at a speed dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually was at the time, or which might reasonably be expected to be, on the said highway:—*Held*, upon an application by prosecutor, on notice, for a conditional order for a *certiorari*, that the conviction was good in form, and that it was not necessary that it should appear on its face whether the circumstances taken into consideration by the magistrates were the amount of the traffic which was actually at the time on the highway, or the amount which might reasonably be expected to be there. *Held*, also (assuming it to be open to the prosecutor, having regard to the form of conditional order asked for, to go into the suffi-

MOTOR CAR—*continued.*
ciency of the evidence), that the evidence was sufficient to justify a conviction under the section. *Held*, also, that the magistrate, in drawing up then and there the formal conviction, was at liberty to amend a technical error in the form of the order, as appearing in the entry in the police summons book. *The King* (*Cahill*) v. *Divisional Justices of Dublin* - - - - - - - K. B. 698

NAME—Of Company—False representation 634
See DENTIST. 1.

NEGLIGENCE—*Dangerous article—Loaded gun left by defendant on his own land—Intervening act of third party—Proximate cause of injury.*] Defendant left a gun loaded and at full cock standing inside a fence on his lands, beside a gap, from which a private path led over defendant's lands from the public road to his house. The defendant's son, aged between fifteen and sixteen, coming from the road through the gap on his way home, found the gun. He went back with it to the public road, and not knowing that it was loaded, pointed it, in play, at the plaintiff, who was on the road. The gun went off, and the plaintiff was injured:—*Held*, by the King's Bench Division (Palles, C.B., and Gibson, J.; Boyd, J., *diss.*) and by the Court of Appeal, that the defendant was liable in respect of the injury. *Sullivan* v. *Creed* K. B. 317; APP. 335

2. ——*Ship—Damage—Wharf in tidal river—Obstruction in bed of river—Injury to barge hired by wharfowner to deliver cargo at wharf—Liability of wharfowner.*] The defendants, who were lessees of a wharf in a tidal river, hired a barge of the plaintiff to carry goods to the wharf at a place where the barge must necessarily ground at low water. The defendants had no control over the bed of the river. A block of hardened cement had fallen off the quay into the river; it was visible at low water, but its existence was not known to the defendants. The plaintiff's barge, while alongside the wharf for the purpose of discharging its cargo, grounded on the block of cement when the tide fell, and was injured. In an action for damages for the injury:—*Held* (by Andrews and Gibson, JJ.; *dissentiente* Lord O'Brien, L. C. J.), that the defendants, having invited the plaintiff to discharge the goods at the wharf, were bound to take reasonable care to ascertain that the berthage was reasonably safe, and not having discharged this duty, were liable for the injury. *Held* (by Fitz-Gibbon and Walker, L.JJ.; *dissentiente* Holmes, L.J.), that the decision of the King's Bench Division should be affirmed. The decision in *The Mooreock* (14 P. D. 64) adopted. *Butler* v. *M'Alpine* - - - K. B. 445; APP. 464

—— Collision at sea—Both ships in fault—Personal injuries—Division of loss - 129
See COLLISION.

NOTICE—Application to renew spirit grocer's or beer retailer's license - - 190
See LICENSING ACTS. 5.

NUISANCE—*Abatement—"Owner"—Premises let at a rack-rent—Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *ss.* 2, 107.] *F.* held certain premises in the city of Dublin under a lease from *A.*, at the yearly rent of £34. The poor law valuation was £38. *F.* had sub-let portions of the premises to weekly tenants, and received from these lettings £107 a year. *F.* was herself in occupation of the residue of the premises, the letting value of which was estimated at £19 10*s.* a year:—*Held*, that *F.* was the owner of the premises within the meaning of the Public Health (Ireland) Act, 1878, and liable under that Act to execute structural sanitary repairs. *Bowen* v. *James* (10 L. R. Ir. 26) followed and applied. *Rice* v. *White* K. B. 8

OCCUPIER — Inhabitant — Dwellinghouse — Parliamentary franchise - 383, 389
See PARLIAMENT. 1, 2.

—— Rates—Arrears of—City of Dublin - 596
See RATES. 3.

—— Separate apartments—Belfast municipal rates
See RATES. 1. [374

ORDERS, GENERAL—1891 (19th January), Supreme Court, XVI., R. 11 357, 360
See ACTION TO RECOVER POSSESSION OF LAND. 3.

—— —— XIX., Rr. 4, 6 - - 536, 547
See LIBEL.

—— 1893 (July), Supreme Court, LXV., R. 44 (*e*), R. 64 (40) - - - - 417
See COSTS. 1.

—— —— —— R. 64 - - - - 478
See COSTS. 2.

—— 1896 (27th Nov.), Collisions at Sea, Articles 10–21 - - - - - 129
See COLLISION.

—— 1898 (22nd Dec.), Application of Enactments, Art. 12 - - - - - 529
See COUNTY COUNCIL.

OWNER—Letting in separate apartments—Belfast municipal rates - - - 374
See RATES. 1.

—— Owner of buildings adjoining streets—Expenses of sewering, paving, &c.—Belfast Borough Acts—Order of corporation—Change of ownership before demand 105
See STREET.

PARLIAMENT — *Inhabitant occupier — Separate bedroom — Dwelling-house — Service franchise —48 Vict. c. 3, section 3.*] The claimant was, along with several other men, in the employment of a Company which carried on an extensive drapery business in Belfast. His contract was to be paid a yearly salary, to be boarded by the Company, and to have a bedroom as long as he remained in their service, the service being deter-

minable on notice. There was a bolt inside to fasten the door, but the claimant had not the key. The manager could change an employee from one bedroom to another, if necessary. There were rules, understood in the house, regulating the occupation of bedrooms; that the claimant could not leave his business in the shop to go there without permission; that on Saturday the bedrooms were closed up to 2 p.m. for cleaning. There was no printed rule preventing an assistant being in his bedroom between 11 a.m. and 1 p.m. on Sunday, but there was an understanding to that effect, and if an employee violated this understanding, the superintendent would consider it his duty to correct him:—*Held*, that the claimant was not entitled to the franchise. *Stribling* v. *Halse* (16 Q. B. D. 246) discussed. *M'Quade* v. *Charlton* [APP. 383

2.——*Registration of voters—Religious educational Community—College bedroom, whether constituting "dwelling-house"—Service franchise—Registration appeal—Jurisdiction of Court—Previous decision, how far binding.*] Each teacher and lay brother in College conducted by a religious Community had, as such, during the qualfying period the exclusive use of a separate bedroom in the College, which was managed by a resident principal, under the supreme control of the Superior-General of the Community, who himself lived in Paris. In 1887, in revising the list of voters, the Revising Barrister held that the bedroom so occupied by each of the teachers in the College was a dwelling-house for the purpose of the franchise, and was inhabited by him by virtue of his office or employment as a teacher, and that the College was not (for such purpose) inhabited by any person under whom he served in such office or employment, and he accordingly admitted each of the teachers to the franchise. This decision was affirmed by the Court of Appeal in *Alexander* v. *Burke* (22 L. R. Ir. 443), the four members who constituted the Court feeling themselves bound by *Hasson* v. *Chambers* (18 L. R. Ir. 68) and *Stribling* v. *Halse* (18 Q.B.D. 246). In each subsequent year the names of these teachers appeared on the register, and were not objected to until the year 1903. In this year an objection was served on each teacher and lay brother, the ground of objection being that the room in respect of which the franchise was claimed was not a dwelling-house, and also that its occupant was not its owner or tenant. The Revising Barrister, having regard to the evidence, some of which was not given in the former case, and also having regard to *M'Quade* v. *Charlton* ([1904] 2 I. R. 383), stated that if he had considered himself at liberty so to hold, he would have found that in no case was the bedroom occupied by a member of the Community a dwelling-house

occupied by him by virtue of his office or employment as a teacher or lay brother; but as *Alexander* v. *Burke* (22 L. R. Ir. 443) was a decision of the Court of Appeal in respect of the same institution, and, as to the teachers, in respect of the same voters, declaring them entitled to the franchise, he considered he was bound to retain the names on the register, but stated as a case on the points raised for the Court of Appeal:—*Held*, that the Court of Appeal had power to review, and, if necessary, refuse to follow a decision of its own pronounced in a registration appeal, and that, upon the evidence in the present case, there was nothing to show that the bedroom separately occupied by each of the voters was his dwelling-house, and that they were not entitled to the franchise. *Per* Palles, C.B., Walker and Holmes, L.JJ.: The relation of employer and employed, or of master and servant, did not exist between the other members of the Community and the head of the Order. *Alexander* v. *Burke* (22 L. R. Ir. 443), *Hasson* v. *Chambers* (18 L. R. Ir. 68), and *Stribling* v. *Halse* (16 Q. B. D. 246) not followed. *Ladd* v. *O'Toole* - - - - APP. 389

PARTICULARS—Justification—Waiver
See LIBEL. [536, 547

PARTIES—Ejectment by second mortgagee [357, 360
See ACTION TO RECOVER POSSESSION OF LAND. 3.

PENALTY—Contract with County Council—Councillor—Public work - - 529
See COUNTY COUNCIL.

PERPETUITY—Rule against—Restriction on transfer of shares—Company - 644
See ESTATE DUTY. 2.

PERSONAL INJURIES—Collision at sea—Both ships in fault—Regulations, 1896, Articles 10–21 - - - - 129
See COLLISION.

PHARMACEUTICAL CHEMIST—*Evidence—Register of pharmaceutical chemists and of chemists and druggists—Admissibility of printed copy—Pharmacy Act (Ireland)*, 1875 (38 & 39 *Vict. c.* 57, *s.* 27.] The Pharmacy Act (Ireland), 1875, contains provisions for the making out, by the registrar appointed by the council of the Pharmaceutical Society for Ireland, of a register of pharmaceutical chemists for Ireland, and a register of chemists and druggists in Ireland, and sect. 27 provides that the registrar shall, every year, cause to be printed, published, and sold, correct copies of such registers, and that "printed copies of such registers for the time being in force, purporting to be so printed and published as aforesaid, or any extract therefrom, or from the original registers, certified under the hand of the said registrar, and countersigned by the president or two members of the said council, shall

PHARMACEUTICAL CHEMIST—*continued.* be evidence in all Courts and in all proceedings" of the matters specified in the section:—*Held*, that the condition as to certifying by the registrar and countersigning by the president or two members of the council, refers only to the case where an extract is intended to be made evidence, and that a printed copy of the register, purporting to be printed and published in accordance with the section, is admissible in evidence, though not so certified and countersigned. *Barrett, Appellant*; *Henry, Respondent* - - - - - - - K. B. 693

PILOT—Collision at sea—Action for personal injuries - - - - - - 129
See COLLISION.

PLEADING—Justification—No particulars asked for—Evidence - - - 536, 547
See LIBEL.

POOR LAW—Rates - - - 429, 596
See RATES. 2, 3.

PRACTICE—Action to recover possession of land—Second mortgagee plaintiff—Parties—Equitable title - - - 357, 360
See ACTION TO RECOVER POSSESSION OF LAND. 3.

—— Bankruptcy—Failure to pay less than 10*s.* in the £—Certificate of conformity 118, 125
See CERTIFICATE OF CONFORMITY. 1, 2.

—— Costs.
See COSTS.

—— Discovery.
See DISCOVERY.

—— Mandamus—Refusal of Inland Revenue collector to issue Excise license—Certificate made without jurisdiction - 494
See LICENSING ACTS. 1.

—— Mandamus—Refusal to register Joint Stock Company—False representation in name
See DENTIST. 1. [634

—— Mandamus—Repair of county road—Liability of County Council - - 569, 579
See ROAD.

—— Plea of justification—Libel—No particulars asked for—Evidence - - 536, 547
See LIBEL.

—— Receiver—Petty Sessions clerk's salary 69
See RECEIVER.

—— Subpœnas—Service of—Costs - - 478
See COSTS. 2.

—— Taxation of costs.
See COSTS.

PRE-EMPTION—Right of—Shares in Company—Effect on value—Estate duty 644
See ESTATE DUTY. 2.

PROBATE—Revocation of - - - 267
See REVOCATION OF PROBATE.

PROMISSORY NOTE—Loan fund society—Receiver—Power to compromise—Invalidity—Renewal - - 601, 612
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—— Loan fund society—Time within which proceedings must be taken - - 18
See LOAN FUND SOCIETY. 2.

PROXIMATE CAUSE—Of injury—Negligence in leaving loaded gun unguarded—Intervening act of third party 317, 335
See NEGLIGENCE. 1.

PUBLIC HEALTH ACTS, 1878—Continued neglect—Repeated prosecutions - 1
See VACCINATION.

—— 1900, s. 10—Contributory place 270, 283
See CONTRIBUTORY PLACE.

—— 1878—Nuisance—Abatement of—Premises let at a rack-rent - - - 8
See NUISANCE.

—— 1890, s. 38—Urban district council—By-law—Unreasonableness - - - 518
See BY-LAW.

PUBLIC-HOUSE—Excise license—Certificate made without jurisdiction—Refusal of Inland Revenue—Mandamus - 494
See LICENSING ACTS. 1.

—— Forfeiture of license—Third conviction—Not within same year - - 51
See LICENSING ACTS. 3.

—— Lease—Covenants as to license - 218
See LEASE.

—— Re-assignment—Original license in force 298
See LICENSING ACTS. 2.

—— Sale of intoxicating liquor to children—Conviction—Indorsement - - 587
See INDORSEMENT OF CONVICTION.

—— Sale of intoxicating liquor to children—"Knowingly allow" any person to sell
See LICENSING ACTS. 4. [498

PUBLIC POLICY—Salary of public official—Assignment or attachment of - 69
See RECEIVER.

PUBLIC PURPOSES—Hereditaments used exclusively for—Rating - - 429
See RATES. 2.

PUBLIC WORK—Contract respecting - 529
See COUNTY COUNCIL.

QUARTER SESSIONS—*Appeal to—Justices—Summary jurisdiction—Conviction—Affirmance of order wrongly certified—One conviction on summons charging several offences—Power of King's Bench Division to amend order of Quarter Sessions.*] ***M.***, a publican, was charged at Petty Sessions on a summons, alleging five distinct offences under the Licensing Acts, on one of which he was convicted and fined, the other four charges being dismissed without prejudice. The order was properly entered in the Petty Sessions book. ***M.*** appealed to the Quarter Sessions. The certificate of the order of

QUARTER SESSIONS—*continued.*
the Petty Sessions (Form H) recited the several charges, and stated that the defendant was convicted and fined, but contained no statement as to the charge on which he was convicted, or as to the other charges having been dismissed. The order as so certified was affirmed by the Quarter Sessions:—*Held*, that the order so affirmed was bad on its face, as not showing on which charge the defendant was convicted; that, even if the King's Bench Division had power to amend the error in the order of Quarter Sessions, the present was not a case for the exercise of such power, and that therefore the order of the Quarter Sessions affirming the conviction must be quashed. *The King* (*M'Ardle*) v. *Chairman and Justices of Co. Louth* - - - - - - - K. B. 64

—— Appeal against rates—Dismissal—Certiorari
See RATES. 1. [374

—— Certificate for new license—Made without jurisdiction—Refusal of Inland Revenue to comply with - - - - 494
See LICENSING ACTS. 1.

—— Licensing Sessions—Alleged bias of magistrates - - - - - - 75
See BIAS.

RACK-RENT—Premises let at—Abatement of nuisance - - - - - - 8
See NUISANCE.

RATES—*Belfast Municipal rates—Rateable property—Separate apartments—Owner—Occupier—Liability to rates—Quarter Sessions—Rating appeal—Estoppel—Belfast Improvement Act*, 1845 (8 & 9 *Vict. c.* cxlii.), *ss.* 348, 353, 369—1 & 2 *Vict. c.* 56, *s.* 107.] Under section 348 of the Belfast Improvement Act, 1845, the Belfast Corporation have power to make certain municipal rates upon the occupiers of houses, buildings, &c., within the limits of the Act, according to the annual value of the same. Section 353 enacts that all rateable property within the limits of the Act, the annual value whereof respectively shall not exceed £8, or which shall be let to weekly or monthly tenants, or in separate apartments, shall, for the purpose of rating under the Act, be considered as occupied by the owners thereof, and every such owner shall be rated to and pay the rates directed to be made by the Act. The prosecutors had erected on a plot of ground within the limits of the Act, held by them in fee-simple, a building five stories high. Part of the groundfloor was occupied by them as their own offices, and the remainder of the groundfloor was used for shops, the offices and shops having each a separate entrance from the street. The remainder of the building, consisting of the first, second, third, and fourth floors, was let by the prosecutors in separate, self-contained suites of offices, having a common entrance from the street, the tenants in each case holding under

RATES—*continued.*
tenancies greater than monthly. Each suite was separately valued under the General Valuation (Ireland) Act, 1852, the valuation in each case exceeding £8:—*Held*, that the prosecutors, and not the tenants of the offices, were liable to be rated to and to pay the municipal rates in respect of the suites of offices on the first, second, third, and fourth floors. The Belfast Improvement Act, 1845, gives an appeal to Quarter Sessions against any rate made under the Act, and gives the Quarter Sessions Court the same powers of amending or quashing such rate as in an appeal against poor rates, in which latter case the order on appeal is by the 107th section of the Irish Poor Relief Act, 1838, made "final and conclusive on all parties." The prosecutors in the present case, having been assessed by the Belfast Corporation for the municipal rates in respect of the building in question, appealed to the Quarter Sessions, and an order was there made, "that said appeal be refused with costs," not stating the grounds of refusal:—*Held*, that if the rates had been invalid, the order of the Quarter Sessions would not have prevented the prosecutors from impeaching them on *certiorari*. *The King* (*Scottish Provident Institution and E. G. MacGeorge*) v. *The Recorder of Belfast and The Lord Mayor, Aldermen, and Citizens of the City of Belfast* - - - - - - K. B. 374

2. —— *Exemption—Hereditaments used exclusively for charitable or public purposes—Technical school—Fees paid by the pupils*—15 & 16 *Vict. c.* 63, *s.* 16—17 & 18 *Vict. c.* 8, *s.* 2—62 & 63 *Vict. c.* 50, *s.* 30.] The Commissioner of Valuation having included the Ball's Bridge Branch of the Pembroke Technical Schools in the revision lists of rateable property in the Pembroke Urban District, the District Council appealed to the Recorder of Dublin, who allowed the appeal, but, at the request of the Commissioner of Valuation, stated a case for the opinion of the King's Bench Division. The Branch School, which provided instruction in such subjects as book-keeping, business methods, mathematics, mechanics, mensuration, shorthand, typewriting, drawing, cookery, dressmaking, laundry, and needlework, derived its funds from four sources, viz.—(1) a special rate levied by the District Council, (2) the Parliamentary grant at the disposal of the Department of Agriculture and Technical Instruction, (3) the Equivalent Grants Fund, and (4) a non-compulsory fee of 2*s.* 6*d.* per head charged to the pupils, and expended in providing light and fuel for the school and cleaning the school windows. The school was managed by a committee, which was partly composed of members of the Pembroke Urban District Council and partly of other persons interested in technical education, some of whom resided outside the district:—*Held*, that the school was "dedicated to or used for

RATES—*continued.*
public purposes," so as to be within the exemption of the Valuation Acts, and that the receipt of the fee of 2*s.* 6*d.* per head from the pupils did not, under the circumstances, disentitle it to the exemption. *Guardians of the Waterford Union* v. *Barton* ([1896] 2 I. R. 538) distinguished. *The Pembroke Urban District Council* v. *The Commissioner of Valuation* - - - - K. B. 429

3. —— *Poor rate—City of Dublin—Liability of occupier, extent of—Collection of Rates (Dublin) Act*, 1849, *s.* 74—*Local Government (Ireland) Act*, 1898—12 *&* 13 *Vict. c.* 104, *s.* 19—*Repeal of Statute.*] Though section 74 of the Collection of Rates (Dublin) Act, 1849, has not been repealed, it has ceased to be applicable to poor rate leviable in the city of Dublin, under the authority of the Local Government Act, 1898, and accordingly an occupier of premises in the city is liable for poor rates struck within two years of suit, though his occupation commenced after portion of the rate sued for had accrued. *Farrell* v. *Ryan* K. B. 596

REASONABLENESS — By law — Whirligigs and swings - - - - - 518
See BY-LAW.

RE-ASSIGNMENT—Licensed premises 298
See LICENSING ACTS.

RECEIVER — *Practice — Equitable execution—Clerk of Petty Sessions—Salary of—Assignment—Public policy.*] A Petty Sessions clerk covenanted to assign his official salary to plaintiff to secure an annuity. The plaintiff, having recovered judgment for arrears of the annuity, obtained an order for the appointment of a receiver by way of equitable execution over the future salary of the Petty Sessions clerk:—*Held*, that the order for the appointment of a receiver by way of equitable execution ought to be discharged. *Per* Kenny, J., a clerk of Petty Sessions is a public and judicial officer, and the assignment of his salary would be contrary to public policy and unenforceable. *M'Creery* v. *Bennett* - - - K. B. 69
—— Loan fund society—Power to compromise
See LOAN FUND SOCIETY. 1. [601, 612

REDEMPTION OF RENT ACT — Fair rent fixed— Tithe rentcharge — Liability to
See TITHE RENTCHARGE. [200

REGISTER — Of pharmaceutical chemists — Printed copy—Admissibility - 693
See PHARMACEUTICAL CHEMIST.

REGISTRATION—Dental company 27, 634
See DENTIST. 1, 2.

REGISTRY APPEAL — Review of previous decision - - - - - 389
See PARLIAMENT. 2.

RENT—Variation of - - - - 502
See VARIABLE RENT.

REPAIR—County road — Liability of County Council - - - - - 569, 574
See ROAD.

REPEAL OF STATUTE—Collection of Rates (Dublin) Act, 1849, s. 74 - - 596
See RATES. 3.

REVENUE—Estate duty - - 621, 644
See ESTATE DUTY. 1, 2.

REVOCATION OF PROBATE — *Laches — Acquiescence.*] A person claiming to be sole next-of-kin of a testator, who died ten years before, having made a will leaving his property, very small in amount, to a stranger, brought an action to revoke the grant of probate made to the executor in common form. The plaintiff was shortly after the death of the testator aware of the existence of the will and of its terms, but took no step to contest the will, and allowed the executor to administer the estate. No grounds were alleged for disputing the will. The Court held that it would be contrary to settled principle to allow the plaintiff to proceed with the action, which was groundless and vexatious, and made an order staying further proceedings. *In the Goods of Mahon, deceased*; *Mahon* v. *Quinn* - - - - - K. B. (PROB.) 267

ROAD—*Repair of—Local government—Liability of County Council—Refusal to keep in repair—Remedy, indictment or mandamus—Local Government (Ireland) Act*, 1898 (61 *&* 62 *Vict. c.* 37), *ss.* 81, 82.] A County Council made a contract with a road contractor to maintain a road for five years. During the period, the road contractor became incapable of work, and, as the work was not performed satisfactorily, certain sums were retained by the county surveyor from time to time out of the amount payable. A new contract was made with another contractor to put the road in a proper state of repair within one month, and to keep it in good order. But before this the road had fallen into a very bad state, having been totally neglected, and the amount provided by the new contract was wholly insufficient to remedy this. A ratepayer, whose lands adjoined the road, complained on several occasions of its condition, and demanded from the County and District Councils that they should put it into, and maintain it in, proper repair. This demand not having been complied with, he applied to the King's Bench for a writ of mandamus, to command the District and County Councils to put the road in proper repair:—*Held*, by the Court of Appeal (affirming the decision of the King's Bench Division), (1) that the duty was imposed by sect. 82 of the Local Government Act, 1898, on the District and County Councils to maintain the roads in proper repair; (2), that that duty was not discharged to the ratepayers by entering into a contract to repair and keep in repair, but that they were bound to see the work done; (3) that the action of the District and County

ROAD—*continued.*
Councils amounted to a refusal on their part to perform their duty: (4) that mandamus was the appropriate remedy. *The King (Westropp)* v. *Co. County Council of Clare and Scariff Rural District Council* - - - K. B. 569; App. 579

SALE OF INTOXICATING LIQUOR TO CHILD - - - 498, 587
See Indorsement of Conviction.
Licensing Acts. 4.

SANITARY AUTHORITY — Abatement of nuisance— Rack-rent - - 8
See Nuisance.

—— Repeated prosecutions - - - 1
See Vaccination.

SERVANT.
See Master and Servant.

SERVICE FRANCHISE—48 Vict. c. 3, s. 3
See Parliament. 1, 2. [383, 389

SETTLEMENT.
See Marriage Settlement.

SHARES—Restriction on transfer—Value for purposes of estate duty - - 644
See Estate Duty. 2.

SHIP—Collision - - - - - 129
See Collision.

—— Damage from obstruction in bed of tidal river — Wharfowner, whether responsible for
See Negligence. 2. [445, 464

SOLICITOR—Attending trial as witness 478
See Costs. 2.

—— Taxation of costs.
See Costs.

SOLICITOR'S LIEN—*Charging order—"Property recovered or preserved"—Building contract—Retention money — Assignment of — Priority—39 & 40 Vict. c. 44, s. 3.*] The plaintiff recovered judgment against the defendants in an action brought to recover £1040 15*s.* 1*d.* for—(1) extras under a building contract, and (2) 10 per cent. of the contract price retained by the defendants under a new term of the contract. Three months prior to the issue of the writ in the action portion of the said retention money coming to the plaintiff was assigned by him for valuable consideration to *W. G.*, the latter being a member of the Urban Council, the defendants. The judgment, entered at the trial for the plaintiff, was subsequently set aside by an order of the King's Bench Division, whereupon the plaintiff appealed to the Court of Appeal; but, pending the Appeal, a consent was signed by the parties, under the terms of which the defendants were to pay to the plaintiff portion of the sum claimed, in satisfaction of his full claim under the contract, the plaintiff paying the defendants their taxed costs of the action. Upon an application by the solicitor for the plaintiff in the action for a charging order for his costs under 39 & 40 Vict. c. 44, s. 3:—*Held*, (1) that the money payable

SOLICITOR'S LIEN—*continued.*
under the consent was money "recovered or preserved in the action" by the instrumentality of the solicitor for the plaintiff; and (2) that the assignee, having known of and adopted the proceedings, and now seeking payment out of the money so recovered, was not entitled, as a *bonâ fide* purchaser for value without notice, to payment in priority over the costs of the solicitor for the plaintiff. *M'Larnon* v. *Carrickfergus Urban District Council* - - - - - K. B. 44

SPEED—Dangerous to the public—Motor Car Act - - - - - - 698
See Motor Car.

SPIRIT GROCER—Renewal of license—Notice of application - - - - - 190
See Licensing Acts. 5.

STATUTES:

3 & 4 Wm. 4, c. 37—Church Temporalities, s. 142 - - - - - - 502
See Variable Rent.

3 & 4 Wm. 4, c. 68—Licensing, s. 4 - 298
See Licensing Acts. 2.

1 & 2 Vict. c. 56—Poor Relief, s. 107 - 374
See Rates. 1.

5 & 6 Vict. c. 24—Dublin Police, ss. 70, 72
See Motor Car. [698

6 & 7 Vict. c. 91—Charitable Loan Societies
See Loan Fund Society. 2. [18

8 Vict. c. 18—Lands Clauses, s. 127 - 421
See Discovery.

8 & 9 Vict. c. cxlii.—Belfast Improvement, ss. 348, 353, 369 - - - 374
See Rates. 1.

12 & 13 Vict. c. 91—Collection of rates (Dublin), s. 74 - - - - - - 596
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STREET—*County Antrim and Belfast Borough Act*, 1865 (28 & 29 *Vict. c. clxxxiii*), *ss.* 86–89—*Belfast Borough Act*, 1868 (31 & 32 *Vict. c. czvii*), *s.* 23—*Expenses of sewering, paving, &c.—Liability of owner of buildings and lands adjoining—Change of ownership before demand of payment—Footpath—Dedication.*] The plaintiffs, the Belfast Corporation, had made an order, under sect. 86 of the County Antrim and Belfast Borough Act, 1865, for the sewering, flagging, paving, &c., of a street in the city of Belfast, which order, accompanied by the surveyor's estimate of the expenses and the shares thereof payable by the several owners of buildings and lands adjoining the street, was duly published and posted as required by the Act. At the date of the order the defendant was an owner, within the meaning of the Act, of lands, subject to a mortgage, adjoining the street, and he continued owner for a period of more than a month after the last publication of the order. The defendant never executed the required works, and his share of their estimated expense was demanded from him by the plaintiffs. At the time of making such demand the defendant had ceased to be owner, the mortgagees having entered into possession and receipt of rents:—*Held*, that the defendant was liable for the amount demanded, notwithstanding that he had ceased to be owner when the demand was made. The defendant, who held under a lease for a long term of years, had built on the lands a number of cottages, and had made, for the benefit of the tenants of these cottages, a footpath on the lands in front of the cottages and bordering the street in question, the whole forming apparently a street consisting of a roadway and this footpath. The order for sewering, &c., made by the plaintiffs included this footpath:—*Held*, that there was jurisdiction to make the order in respect of the footpath. *The Lord Mayor, Aldermen, and Citizens of Belfast* v. *Hill* K.B. 105

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SURRENDER—*By middleman — Landlord and tenant—Land Law (Ireland) Act*, 1887, *sect.* 8—*Reduction of rent—Time for serving notice of surrender.*] Defendant was tenant to the plaintiff under a sub-grant in perpetuity, dated the 2nd July, 1873, of lands in the county of Armagh, containing 45A. 3R. 1P. at the rent of £63 2*s.* 5*d.* At the date of the passing of the Land Law (Ireland) Act, 1881, he had sublet 42A. 1R. 6P. to five sub-tenants, whose rents amounted to £62 0*s.* 8*d.*, retaining in his own hands 3A. 2R. 15P. After the passing of the Act of 1881 all the sub-tenants' rents were reduced by fair rent agreements filed in the Court, each sub-tenant obtaining a reduction, the last reduction being made by agreement dated the 4th March, 1884, and this reduced the sub-tenants' rents to £43 15*s.*, which was the total rental receivable by the defendant at the passing of the Land Law (Ireland) Act, 1887, out of the portions sublet. In 1898, 1899, and 1900 the tenants obtained further reductions on second term rents fixed by agreements filed in Court which reduced the total rents to £35, the last second term reduction being made by agreement dated 2nd August, 1900. On the 27th April, 1900, the defendant served notice of intention to surrender, which the plaintiff refused to accept. The defendant then served notice to fix a fair rent on the 3A. 2R. 15P. in his possession, and the fair rent was fixed at £2 18*s.* by the Land Commission on the 28th March, 1901; and on the 6th April, 1901, the defendant served a second notice of intention to surrender, tendered a deed of surrender, and paid all rent down to the 1st May, 1901. The plaintiff refused to accept the surrender, and sued for rent accrued down to November, 1902:—*Held*, by the King's Bench Division (Palles, C.B., and Barton, J.; Andrews, J., *diss.*), that inasmuch as the rent receivable by the defendant at the passing of the Land Law (Ireland) Act, 1887, from the portions sublet had been reduced to a sum less than the rent paid by him, notice of intention to surrender should have been served by the defendant within nine months after the passing of the Act; that no new right of surrender arose on the subsequent reductions, or on the fixing of a fair rent on the part sublet; and that therefore the notice of intention to surrender had not been served within the time prescribed by sect. 8, sub-sect. 8, of the Land Law (Ireland) Act, 1887, and the defendant was liable for the rent sued for. *Held*, by the Court of Appeal (reversing the judgment of the King's Bench Division), that the notice of surrender served on the 6th April, 1901, was served in sufficient time within section 8 of the Land Law Act of 1887, and that the surrender was good. *Wilson* v. *Boyle* - - K. B. 147; APP. 165

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TITHE RENTCHARGE—*Landlord and tenant—Land Law (Ireland) Acts—Redemption of Rent Act*, 1891—*Liability of tenant after fair rent fixed.*] The grantee or tenant under a fee-farm grant, after an order under the Redemption of Rent Act, 1891, fixing a fair rent upon his holding, still remains liable to tithe rentcharge. *The Irish Land Commission* v. *Magorian* ([1901] 2 I. R. 445) approved. *Irish Land Commission* v. *Brown* - APP. 200
VACCINATION—*Neglecting to comply with the Act—Second prosecution—Magistrate—Jurisdiction* 26 & 27 *Vict. c.* 52—42 & 43 *Vict. c.* 70.] Where a person has been convicted, under sect. 8 of the Vaccination Act, 1863 (26 & 27 Vict. c. 52), for refusing and neglecting to have his child vaccinated, and after conviction still refuses and neglects to have the child vaccinated, he cannot, in respect of such continued refusal and neglect, be prosecuted again under sect. 7 of the Vaccination Act, 1879 (42 & 43 Vict. c. 70).—The Vaccination Act, 1879, was merely an amending Act, and did not create a new substantive offence, independent and distinct from that created by sect. 8 of the Vaccination Act, 1863. Sect. 9 of the Vaccination Act, 1879, did not abolish the registrar's notice provided by sect. 8 of the Vaccination Act, 1863, but merely rendered it unnecessary, in a prosecution for neglect, to prove that the defendant received the notice. Repeated prosecutions for continued neglect can be brought by the sanitary authority, under the Public Health (Ir.) Act, 1878 (41 & 42 Vict. c. 52, s. 147). *The King (Vint)* v. *Justices of Donegal* [K. B. 1
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